Supreme Court, U.S.
FILED
07 - 197 AUG 13 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

FRED O. DICKINSON, III, *et al.*,

Petitioners.

v.

MARY ANN COLLIER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BILL MCCOLLUM
ATTORNEY GENERAL OF FLORIDA
LOUIS F. HUBENER, III
OFFICE OF THE ATTORNEY GENERAL
SCOTT D. MAKAR
SOLICITOR GENERAL
Florida Capitol
400 S. Monroe Street
Tallahassee, FL 32399-6536
(850) 414-3300

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 13, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Whether the Drivers' Privacy Protection Act ("DPPA") creates a private right of action for damages against State officials for enforcing State laws, policies and practices that allegedly violate the DPPA.

2. Whether a cause of action for billions of dollars in damages against State officials for enforcing State law for the sole benefit of the State and in compliance with State law requirements violates the Eleventh Amendment to the United States Constitution.

3. Whether a federal right is "clearly established" for purposes of qualified immunity when it arises under a federal statute never previously held to create a private cause of action against state actors and when the State officials' conduct complies with mandatory State law obligations.

PARTIES TO THE PROCEEDING

The parties to the proceeding were Defendants-Appellees Fred O. Dickinson, III, Carl A. Ford, Sandra Lambert, Michael D. McCaskill, Boyd Walden, Phillip Shelton, David M. Perryman, and Lawrence J. Bilbo, and Plaintiffs-Appellants Mary Ann Collier, Arthur L. Wallace, Roy McGoldrick, and Robert Pino. The Florida Department of Financial Services was a Defendant below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	4
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE PETITION	13
I. THE DECISION THAT THE DPPA CREATES A PRIVATE CAUSE OF ACTION FOR DAMAGES AGAINST STATE OFFICIALS FOR COMPLYING WITH STATE LAW IS WRONG AND WILL HAVE DISASTROUS CONSEQUENCES FOR THE STATES	13
II. A SUIT AGAINST A STATE OFFICIAL SEEKING MONEY DAMAGES SOLELY FOR THE OFFICIAL'S COMPLIANCE WITH OR IMPLEMENTATION OF STATE LAW IS BARRED BY THE ELEVENTH AMENDMENT	19
III. THE STATE OFFICIALS DID NOT VIOLATE CLEARLY ESTABLISHED LAW AND WERE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW	23

TABLE OF CONTENTS – continued

Page

CONCLUSION..... 28

TABLE OF AUTHORITIES

CASES Page

Alden v. *Maine*, 527 U.S. 706 (1999)..... 19
Anderson v. *Creighton*, 483 U.S. 635 (1987)..... 26, 27
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986)..... 19
Bogard v. *Morckel et al.*, No. 5:07-cv-00671 (N.D. Ohio filed Mar. 8, 2007)..... 18
Butler v. *City of Prairie Vill., Kan.*, 172 F.3d 736 (10th Cir. 1999)..... 16
Collier v. *State*, 943 So. 2d 945 (Fla. Dist. Ct. App. 2006)..... 11
Connecticut ex rel. Blumenthal v. *Crotty*, 346 F.3d 84 (2d Cir. 2003)..... 25
Cornforth v. *Univ. of Okla. Bd. of Regents*, 263 F.3d 1129 (10th Cir. 2001)..... 16
Davis v. *Scherer*, 468 U.S. 183 (1984)..... 26
Douglas v. *Mitchell*, 410 So. 2d 936 (Fla. Dist. Ct. App. 1982)..... 9
Duckworth v. *Franzen*, 780 F.2d 645 (7th Cir. 1985), *abrogated on other grounds by Farmer* v. *Brennan*, 511 U.S. 825 (1994)..... 22
Edeman v. *Jordan*, 415 U.S. 651 (1974)..... 22
Fid. Fed. Bank & Trust v. *Kehoe*, 547 U.S. 1051 (2006)..... 4, 17
Ford Motor Co. v. *Dep't of Treasury*, 323 U.S. 459 (1945), *overruled on other grounds*, *Lapides* v. *Bd. of Regents*, 535 U.S. 613 (2002)..... 6
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) .. 15, 18, 27
Hafer v. *Melo*, 502 U.S. 21 (1991)..... 16
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)..... 23
Hope v. *Pelzer*, 536 U.S. 730 (2002)..... 24
Idaho v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997)..... 6, 19, 20, 23

TABLE OF AUTHORITIES – continued

Page

Kracum v. *McCormack et al.*, No. 0:07-cv-01462 JMR/FLN (D. Minn. filed Mar. 8, 2007) 17

Lizzi v. *Alexander*, 255 F.3d 128 (4th Cir. 2001), *abrogated on other grounds by Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2000) 16, 17, 22

Luder v. *Endicott*, 253 F.3d 1020 (7th Cir. 2001) ... 6, 21

Mills v. *Doyle*, 407 So. 2d 348 (Fla. Dist. Ct. App. 1981) 9

Montgomery v. *Maryland*, 266 F.3d 334 (4th Cir. 2001), *vacated on other grounds*, 535 U.S. 1075 (2002) 21, 22

Pierson v. *Ray*, 386 U.S. 547 (1967) 24

Poynter et al. v. *Vincent et al.*, No. 2:07-cv-04047-NKL (W.D. Mo. filed Mar. 6, 2007) 17

Reno v. *Condon*, 528 U.S. 141 (2000) 9, 14, 24

Rine et al. v. *Dickinson et al.*, No. 3:07-cv-00156 (M.D. Fla. filed Mar. 6, 2007) 17

Roska ex rel. Roska v. *Peterson*, 328 F.3d 1230 (10th Cir. 2003) 25

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 19

Smith v. *United States*, 287 F.2d 299 (5th Cir. 1961) 20

Starlight Sugar, Inc. v. *Soto*, 253 F.3d 137 (1st Cir. 2001) 26

Sullivan v. *Town of Salem*, 805 F.2d 81 (2d Cir. 1986) 25

United States ex rel. Dunleavy v. *County of Del.*, 279 F.3d 219 (3d Cir. 2002), *vacated on other grounds*, 538 U.S. 918 (2003) 21

United States ex rel. Gaudineer & Comito, L.L.P. v. *Iowa*, 269 F.3d 932 (8th Cir. 2001) 6, 20

Vt. Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 20

TABLE OF AUTHORITIES – continued

Page

Wilson v. *Layne*, 526 U.S. 603 (1999) 24, 25
Ex Parte Young, 209 U.S. 123 (1908) 6, 19

CONSTITUTIONS AND STATUTES

U.S. Const. amend. XI 2
18 U.S.C. § 2721 9
§ 2723 ..... 2, 5, 10, 14
§ 2724 ..... 2, 10, 14
§ 2725 ..... 5, 9, 14
29 U.S.C. § 203(d) 21
§ 2611(4)(I) 21
Fla. Const. art. I, § 24 ..... 3, 8
2004 Fla. Sess. Law Serv. 2004-62 (West) 9
Fla. Stat. § 119.07(3) (2000) 3
§ 1119.07(3)(aa) (2003) 8
§ 1119.07(3)(aa) (2004) 8, 9
§ 119.011(11) 8
§ 119.021 10
§ 119.0712(3) 9
§ 119.10 8
§ 119.12 8
§ 322.02(2) 8
§ 322.05(1) 8
§ 322.08(2) 8

PETITION FOR CERTIORARI

Petitioners, Fred O. Dickinson III, Sandra Lambert, and Carl Ford (collectively "petitioners" or "Florida officials") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) was entered on February 12, 2007, and is reported at 477 F.3d 1306 (11th Cir. 2007). The order denying petitioners' petition for panel rehearing and rehearing en banc (App. 56a-57a) was entered on May 4, 2007, and is not reported. The opinion and order of the United States District Court for the Southern District of Florida granting petitioners' motion to dismiss plaintiffs' Second Amended Complaint (App. 12a-44a) was entered on March 30, 2006, and is not reported.

JURISDICTION

The court of appeals entered its opinion and judgment on February 12, 2007. Petitioners filed a timely petition for panel rehearing and rehearing en banc. That petition was denied on May 4, 2007. Petitioners timely filed an application for extension of time for the filing of their petition for certiorari on July 23, 2007. That motion was granted on July 25, 2007, extending the time for filing until September 4, 1007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Sections 2723 and 2724 of Title 18 of the United States Code, the Drivers' Privacy Protection Act ("DPPA"), provide as follows:

§ 2723. Penalties

(a) **Criminal fine.** – A person who knowingly violates this chapter shall be fined under this title.

(b) **Violations by State department of motor vehicles.** – Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) **Cause of action.** – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in the United States district court.

(b) **Remedies.** – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

The DPPA is produced in full at App. 58a-65a.

The Florida Constitution, Article I, § 24, provides in pertinent part as follows:

Access to public records and meetings.

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

. . . .

(c) This section shall be self-executing.

Section 119.07(3)(aa) (2000) of the Florida Statutes provides in pertinent part as follows:

Personal information contained in motor vehicle records exempted by an individual's request pursuant to this paragraph shall be released by the department for any of the following uses:

12. For bulk distribution for surveys, marketing, or solicitations when the department has implemented methods and procedures to ensure that:

a. Individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

b. The information will be used, rented, or sold solely for bulk distribution for survey, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have timely requested that they not be directed at them.

INTRODUCTION

The Drivers' Privacy Protection Act ("DPPA") poses a sensitive federalism problem because it directly regulates States and State agencies with respect to their own public records – specifically, driver's license and motor vehicle registration information (hereafter "driver's license information"). Petitioners are one former and two current officials of the Florida Department of Highway Safety and Motor Vehicles. These Florida officials are being sued nominally in their personal capacity in a class action seeking tens of *billions* of dollars in money damages, solely because they fulfilled their obligations under the Florida Constitution and Florida public records laws to disclose driver's license information. What is more, this is just one of many massive private class actions against state officials attempting an end run around the structure of the DPPA and the Eleventh Amendment limitations on raiding the State's fisc.

Although plaintiffs allege that Florida's laws violated the DPPA, plaintiffs did not sue the State in this action. To avoid the DPPA's carefully-drawn limits on suits against the States for policies and practices that are not in compliance with the Act, plaintiffs instead purported to sue Florida officials in their *individual capacities* for literally billions in damages solely for complying with state law. The court of appeals allowed the claims for money damages to go forward. The magnitude of the putative liability imposed on State officials, by itself, warrants this Court's review. See *Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of petition for certiorari). The State officials strongly dispute plaintiffs' claims, but the *in terrorem* effect of the ruling is breathtaking. If the Eleventh Circuit's interpretation of the DPAA stands, States will not be able to adopt or implement any law or policy that even arguably violates the DPPA. If State officials can be sued for billions of dollars for implementing otherwise constitutional State law and policies, none will agree to serve. While such consequences may not

facially violate the Constitution, they strongly point to a reading of the statute that does not impose private liability on government agents, acting pursuant to state law.

The court of appeals' decision is the product of three erroneous legal holdings on important issues of federal law – each of which is in substantial tension with decisions of other courts of appeals and this Court.

First, under the DPPA, the United States Attorney General is authorized to seek civil penalties against any State "that has a policy or practice of substantial noncompliance with" the DPPA. 18 U.S.C. § 2723. This is the exclusive penalty that Congress authorized against States and State agencies whose policies or practices do not comply with the DPPA. Indeed, the DPPA's private civil cause of action may be brought only against "persons," and the Act defines "persons" to *exclude* States and State agencies. *Id.* § 2725(2). The court of appeals, however, held that plaintiffs may evade the carefully calibrated statutory structure simply by suing the State officials in their individual capacities for enforcing the "state polic[ies] and practice[s]" that violate the DPPA.

This interpretation cannot survive any integrated reading of the remedial provisions of the DPPA. But as long as it stands, private plaintiffs are free to bring – and are bringing – massive class actions against state officials individually, seeking billions of dollars based on the officials' enforcement of state laws, policies and practices, thereby exposing the States that indemnify their officials to crippling liability. Alternatively, if States do not indemnify their officers, these lawsuits effectively ensure that State officials will *not* enforce state laws if there exists any possibility of inconsistency with the DPPA. Other courts of appeals have recognized that individual-capacity suits may not be brought where doing so would contravene Congress's purpose in an underlying statute. The Eleventh Circuit's interpretation of the DPPA, however, destroys the reasonable balance Congress clearly intended to implement.

Second, if the DPPA authorizes suits for money damages against Florida officials based solely on their compliance with state law obligations, the DPPA violates the Eleventh Amendment. Plaintiffs may seek declaratory or injunctive relief from State officials for enforcing state laws that violate the Constitution or federal statutes under *Ex Parte Young*, 209 U.S. 123 (1908); but, plaintiffs are forbidden to seek money damages from State officials acting in their official capacities. See *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945), *overruled on other grounds*, *Lapides* v. *Bd. of Regents*, 535 U.S. 613 (2002). The court of appeals here allowed plaintiffs to circumvent the constitutional limitations on suits seeking damages from the States by the mere incantation of the term "individual capacity." This is contrary to this Court's teaching that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading[s]." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997). When a state official acts to comply with a state law obligation, he or she is acting in an official capacity as a matter of law. Moreover, a class action suit that seeks *billions* in damages is self-evidently not directed against individuals, but instead challenges and effectively prevents implementation of state policies and practices that are widely applicable. Unlike the Eleventh Circuit, other courts of appeals confronted with similar allegations have looked behind and *rejected* individual-capacity allegations. See, *e.g.*, *United States ex rel. Gaudineer & Comito, L.L.P.* v. *Iowa*, 269 F.3d 932, 937 (8th Cir. 2001); *Luder* v. *Endicott*, 253 F.3d 1020, 1022-23 (7th Cir. 2001).

This Court should grant review here to make clear that bare individual-capacity allegations are not conclusive, and that claims against state officials for obeying otherwise constitutional state law are official-capacity claims.

Finally, assuming *arguendo* that plaintiffs can bring individual-capacity claims against the State officials for compliance with their state law obligations, the Eleventh

Circuit's denial of qualified immunity from this potential liability for billions of dollars rested on two legal errors worthy of this Court's attention. First, the court below gave no weight to the fact that the State officials were complying with state law obligations, saying that these officials should have known that state law would be preempted. App. 10a n.3. This cavalier treatment of clear state law is in substantial tension with this Court's jurisprudence that conflicting state and local laws and policies are critically important to the qualified-immunity inquiry. In this setting, a court should apply a strong presumption that the alleged violation of federal law is not "clearly established."

Second, the court of appeals simply ignored that, far from being "clearly established," the question whether plaintiffs had any federal right to bring a DPPA action against State officials had *never* been decided until the Eleventh Circuit ruled in this case. See App. 37a (district court held that the State officials lacked "'fair warning'" for this reason). The Eleventh Circuit apparently does not believe that legal uncertainty about whether a cause of action exists is relevant to the question whether the federal right is "clearly established." This view is in significant tension with this Court's cases, but it remains an issue that has not been directly addressed. The answer will have important ramifications in all cases where federal rights seem clear, but it is entirely unclear whether private plaintiffs have a cause of action to enforce those rights. This Court should grant review and hold that in determining whether government officials have qualified immunity, the law is not "clearly established" if it is unclear whether plaintiffs have a cause of action over which the federal courts have jurisdiction.

STATEMENT OF THE CASE

1. *The Legal Framework.* To obtain a Florida driver's license, an individual must provide (i) full name and date of birth, (ii) gender, (iii) social security number (whose general disclosure was forbidden as of Oct. 1, 2002), (iv) residence, (v)

mailing address, and (vi) birth country. Fla. Stat. §§ 322.08(2), 322.05(1). To register a motor vehicle in Florida, an individual must provide a permanent street address or place of business, and personal information including a driver's license number. *Id.* § 320.02(2)(a).

Once submitted to the government, this information is presumptively a matter of public record under Florida law. See Fla. Const. art. I, § 24. By statute, public records are documents "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Fla. Stat. § 119.011(11).

Florida's Constitution and Public Records laws require the State's agencies and officials to disclose public records. Specifically, Florida's Constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf," with exceptions not relevant here. Fla. Const. art. I § 24. In addition, until October 1, 2004, Fla. Stat. § 119.07(3)(aa) (2003) required State officials to disclose driver's license information unless the person to whom it pertained affirmatively requested confidentiality. See *supra* at 3 (quoting provision in full). After October 1, 2004, Florida law authorized the disclosure of driver's license information if the individual providing that information authorized its disclosure. See Fla. Stat. § 119.07(3)(aa) (2004).

Florida officials in the Department complied with their obligations under Florida law both before and after October 1, 2004. Under Florida law, the failure to comply with state public records laws and policies subjects the individual official to removal from office, criminal sanctions, and civil suit. See Fla. Stat. §§ 119.10, 119.12. Indeed, in Florida, state officials who fail to comply with open-records laws are subject to mandamus, and the relevant agency is assessed the other party's fees if records are not furnished when requested. See

Douglas v. *Mitchell*, 410 So. 2d 936 (Fla. Dist. Ct. App. 1982); *Mills* v. *Doyle*, 407 So. 2d 348 (Fla. Dist. Ct. App. 1981).

Enacted in 1994, the DPPA generally prohibits State departments of motor vehicles from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity . . . personal information . . . about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a). The DPPA defines "personal information" as information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address . . . , telephone number, and medical or disability information." *Id.* § 2725(3).

The DPPA does not prevent States from disclosing driver's license information if drivers consent. As originally enacted, "the DPPA provided that a DMV could obtain that consent either on a case-by-case basis or could imply consent if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity." *Reno* v. *Condon*, 528 U.S. 141, 144 (2000). On October 9, 1999, however, Congress amended the Act to "change[] this 'opt-out' alternative into an 'opt-in' requirement," requiring States to "obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.* at 144-45. That provision took effect on June 1, 2000.

As noted above, Florida passed legislation to amend its public records law to comport with the DPPA on May 13, 2004. See Fla. Stat. § 119.07(3)(aa)(12); 2004 Fla. Sess. Law Serv. 2004-62 (West). That amendment was effective October 1, 2004. See Fla. Stat. § 119.0712(3).

DPPA's remedial provisions both authorize penalties against the States and State agencies and create a private cause of action. Section 2723 provides that a State or State agency that

maintains a "policy or practice" of substantial noncompliance with the Act may be subject to a civil penalty imposed by the United States Attorney General of not more than $5,000 per day. 18 U.S.C. § 2723(b) (quoted in full *supra* at 2). Section 2724 creates a private cause of action, stating that any "person" who knowingly obtains, discloses or uses information from a state motor vehicle record for a use other than those specifically permitted by the DPPA may be liable in a civil action brought by the affected driver. *Id.* § 2724 (quoted in full *supra* at 2).

2. *The Parties.* When this action was filed, petitioners Dickinson, Ford, and Lambert were three executive-level officials at the Florida Department of Highway Safety and Motor Vehicles ("the Department"). Specifically, Dickinson was the Department's Executive Director; he no longer serves in that position. Ford was and remains the Director of the Division of Motor Vehicles, and Lambert is still the Director of the Division of Driver Licenses. App. 14a (citing Second Amended Complaint ("SAC") ¶¶ 5-7). All are "custodia[ns]" of public records within the meaning of Fla. Stat. § 119.021.

Plaintiffs represent a class of individuals who have owned one or more vehicles registered with the Department and who have held Florida driver's licenses issued by the Department. App. 13a-14a. To obtain their registrations and licenses, plaintiffs provided the Department with certain "'personal information,'" as defined in the DPPA. *Id.* at 14a. Plaintiffs claim there may be as many as 15 million persons in the class, see SAC ¶ 12.A(iii), and seek $2,500 for each plaintiff, *id.* ¶ 34.

At issue in this case is the individual or personal liability of the officials of the Department for fulfilling their state law obligation to disclose driver's license information.

3. *District Court Proceedings.* In their class action complaint, plaintiffs alleged that commencing June 1, 2000, the Florida officials compiled the personal information that

plaintiffs had provided to the Department and that, for the financial benefit of the State, Florida sold that information to third parties for bulk distribution for purposes not permitted by the DPPA. App. 14a (citing SAC ¶ 11).[1] Plaintiffs sought money damages against the State officials in their individual capacities for violations of (i) their constitutional right to privacy under 42 U.S.C. § 1983, and (ii) the DPPA, by itself and as enforced through § 1983.

On July 15, 2004, the State officials filed a motion to dismiss, asserting, *inter alia*, that this action is barred by the Eleventh Amendment because the State is the real party in interest, that plaintiffs failed to state a claim under the DPPA, and that the State officials were entitled to qualified immunity from damages. App. 46a.

On January 3, 2005, the district court ordered discovery on questions related to whether the State officials were entitled to qualified immunity from suit. See App. 54a. The court explained that:

> [g]iven the state of the law at the time of the alleged wrongful conduct, it is unclear whether Defendants are entitled to qualified immunity for the DPPA claim. For example, Florida law conflicted with the DPPA at the time of the alleged wrongful conduct, *Compare, e.g.*, 18 U.S.C. § 2721, to § 119.07(aa), Fla. Stat. (2000). In addition, Defendants assert that they "had no discretion under state law to refuse to release public records when requested." [App. 53a-54a.]

After discovery, the State officials again moved to dismiss the complaint. Declining to address the other constitutional and statutory arguments that the State officials made, the district court granted the motion to dismiss, holding that

---

[1] This case was brought as a federal companion to a state action against Florida for damages and injunctive relief based on the same alleged violations. *See Collier* v. *State*, 943 So. 2d 945 (Fla. Dist. Ct. App. 2006).

plaintiffs' claims were barred by the doctrine of qualified immunity.

As relevant here, the district court held that the DPPA does create a private cause of action against all persons, including the State officials. App. 36a-37a. Nonetheless, the court held that the State officials were entitled to qualified immunity because "the state of the law was not sufficiently clear to provide [the officials] with 'fair warning' that their conduct violated a statutory right," *id.* at 37a, or "expose[d] [them] to personal liability." *Id.* at 40a.

> [The State officials] were faced with a difficult executive-level policy decision, indeed they were stuck between a proverbial "rock and a hard place." On the one hand, there was an amendment to the DPPA that arguably mandates an "opt in requirement," *see Condon*, 528 U.S. at 669 . . . . On the other hand, the Florida Constitution contains language regarding public records that describes itself as "self-executing" and presumes . . . public records . . . must be disclosed absent an express constitutional or legislative exemption that precludes disclosure. *See* Fla. Const. Art. I, § 24. Furthermore, at the time of [the State officials'] conduct, a Florida statutory provision governed the release of records by the [Department]. *See* Fla. Stat. § 119.07(aa) (2003). [App. 40a-42a (footnote omitted).]

4. *The Court of Appeals.* The Eleventh Circuit reversed. Again, as relevant here, the court of appeals held that the DPPA does authorize individuals to bring a private cause of action against "persons" who disclose their motor vehicle records without consent. App. 6a. Thus, the court found that the State officials were "persons" even though they were sued for complying with state law obligations, policies and practices. The court also held that the statutory right created by the DPPA could be enforced under § 1983. The court rejected the State officials' arguments that Congress did not intend to authorize

any private cause of action based on State officials' compliance with state law, policies and practices. *Id.* at 6a-9a.

Finally, the court rejected the district court's determination that the law was not clearly established when the State officials acted, holding that the language of the DPPA and this Court's decision in *Reno* gave the State officials' fair warning that their disclosures were unlawful. App. 9a-10a. The court dismissed the State officials' reliance on their conflicting state law obligations, saying that these officials – two of whom were not lawyers while the other was not practicing law – should have known "that the DPPA preempted any conflicting state law." *Id.* at 10a n.3.[2]

The State officials sought rehearing and rehearing en banc. The petition was denied on May 4, 2007.

REASONS FOR GRANTING THE PETITION

I. THE DECISION THAT THE DPPA CREATES A PRIVATE CAUSE OF ACTION FOR DAMAGES AGAINST STATE OFFICIALS FOR COMPLYING WITH STATE LAW IS WRONG AND WILL HAVE DISASTROUS CONSEQUENCES FOR THE STATES.

The DPPA's remedial scheme reflects Congress's solicitude for State sovereignty. This respect was particularly appropriate in light of the fact that Congress was regulating in the highly sensitive area of the States' treatment of their own public records. The DPPA creates a private cause of action,

---

[2] The court acknowledged that the challenged acts of the State officials were "undertaken pursuant to the performance of [their] duties," and "within the scope of [their] authority," and therefore that the State officials were acting within the scope of their discretionary authority. App. 2a n.1 (quoting *Lenz* v. *Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995)). Although the actions were within the officials' discretionary authority, their content was dictated by state law – that is, Florida law required the disclosure of the driver's license information at issue. *See supra* at 8.

but makes clear both that there is no private cause of action for money damages against States or State agencies, *and* that only the United States Attorney General can enforce the DPPA against state "polic[ies] and practice[s]" that are alleged not to comply with the Act.

The DPPA provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record" in violation of the Act may be liable for "actual damages, but not less than liquidated damages in the amount of $2,500," plus punitive damages and attorneys' fees. 18 U.S.C. § 2724. The DPPA's definition of "person," however, expressly *excludes* States and State agencies. *Id.* § 2725(2). The DPPA, accordingly, establishes no private cause of action against States and State agencies.

In addition, the DPPA specifies that the Attorney General is the entity responsible for enforcing the Act against "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance." *Id.* § 2723. This section limits the States' potential liability to "not more than $5,000 a day." *Id.* Thus, the Act contemplates that challenges to State laws, policies and practices that violate the DPPA will be brought by the Attorney General and will be punishable only by a daily fine. See *Reno*, 528 U.S. at 147 ("[w]hile the DPPA defines 'person' to exclude States and state agencies, § 2725(2), a state agency that maintains a 'policy or practice of substantial noncompliance' with the Act may be subject to a civil penalty imposed by the United States Attorney General of not more than $5000 per day of substantial noncompliance").

Under Florida law (both its Constitution and a state statute), the State officials here were required to disclose driver's license information upon request. Clearly, this was a State "policy or practice" within the meaning of the DPPA, and its validity was incontestable, but for the DPPA. The Attorney General could have sought from Florida a penalty of "not more than $5,000 a day" had he determined that Florida's policy or practice was not in "substantial compliance" with the Act.

This case, however, was filed by a class of private plaintiffs who sued Florida officials under the DPPA's private civil cause of action.

The DPPA by its remedial structure makes clear that Congress intended *only* the Attorney General to address State laws, policies and practices that violate the Act. The DPPA's express exclusion of the States and State agencies from the private cause of action and its specification of Attorney General enforcement and limited penalties for States with substantially non-compliant policies and practices would be eviscerated if private plaintiffs could challenge state laws, policies and practices and obtain massive damages simply by naming State officials individually as defendants. It makes no sense to interpret § 2724 to authorize suits that circumvent fundamental limitations in the Act, particularly in an area of federalism that is as sensitive as the enforcement of federal law directly against State law and practices. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002) (once Congress selects an appropriate remedy, there is no private right of action for the same claim).

Despite the structure of the DPPA's remedial provisions, the Eleventh Circuit allowed plaintiffs to bring this suit. The court decided that the State officials were "persons" within the meaning of § 2724, because they were sued *in their individual capacities*. As shown above, this decision is contrary to congressional intent as manifested in the design of the statute. Under the DPPA, State officials may be treated as "persons" for some purposes (*i.e.*, if they used their position to disclose driver's license information for personal reasons). But, clearly, State officials are not "persons" under the DPPA when they are sued for implementing State laws, policies and practices and when the only beneficiary of the use of information is the State.

Other courts of appeals have confronted the same question – whether Congress intended that a State official sued individually be subject to suit as a "person" within the meaning of the federal statute at issue. In some instances, the courts

have refused to interpret federal statutes authorizing suits against "persons" to allow suits against *any* individual State officials. See *Butler* v. *City of Prairie Vill., Kan.*, 172 F.3d 736, 744 (10th Cir. 1999) (holding that "the ADA precludes personal capacity suits against individuals who do not otherwise qualify as employers," and noting that multiple circuits had reached the same conclusion under the ADEA) (citing numerous cases).

Other courts of appeals have refused to allow individual-capacity suits in particular circumstances when doing so would circumvent Congress's limits on suits against the States. Thus, in *Lizzi* v. *Alexander*, 255 F.3d 128, 136-37 (4th Cir. 2001), *abrogated on other grounds by Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2000), the court held that an individual-capacity suit against State officials as "persons" under the FMLA was barred, explaining that "[t]he complaint made no showing of any ultra vires action taken by any individual employee." *Id.* at 136. Otherwise, the court opined, private plaintiffs "would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer." *Id.* at 137. But see *Cornforth* v. *Univ. of Okla. Bd. of Regents*, 263 F.3d 1129 (10th Cir. 2001) (allowing individual-capacity suits under FMLA).

As these cases illustrate, a statute's use of the word "person" cannot be interpreted in a vacuum. Here, the statutory context makes clear that under the DPPA, that word does not include State officials enforcing State law, policy and practice for the benefit of the State.[3]

---

[3] Some of the confusion on this point is engendered by the lower courts' overreading of *Hafer* v. *Melo*, 502 U.S. 21 (1991) – which held that State officials, sued in their individual capacities, are "persons" within the meaning of § 1983. *Id.* at 27-28. Some lower courts have concluded that *Hafer* applies to all federal statutes authorizing suits against "persons," while others recognize that *Hafer* was based on the "'broad language of

The consequences of the Eleventh Circuit's erroneous holding cannot be overstated. The DPPA is directed not only at private parties but also at States in their capacity as States and in connection with their laws and policies related to their own public records. If private plaintiffs can evade the Act's limits on enforcement and penalties vis-à-vis States simply by asserting that they are suing State officials in their individual capacity, the States and their officials face liabilities in the tens of billions of dollars. A class action such as this one, involving almost all Florida drivers and seeking $2,500 in liquidated damages *per driver*, gives rise to a potential, crippling liability of billions of dollars. "This enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." See *Fid. Fed. Bank & Trust*, 547 U.S. at 1051 (Scalia, J., concurring in denial of petition for certiorari) (describing billions in potential liability arising from Florida's period of delay before amending its laws in response to the 2000 amendments of the DPPA).

The ruinous liability confronting Florida and its officials is not, however, the sole reason for urgency. There is a *second* suit pending against Florida officials seeking money damages for alleged disclosures in violation of the DPPA and § 1983 that occurred *after 2004*. See *Rine et al.* v. *Dickinson et al.*, No. 3:07-cv-00156 (M.D. Fla. filed Mar. 6, 2007). Again, the putative class seeks $2,500 per class member, as well as compensatory damages and attorney's fees, and asserts that the class includes a substantial portion of Florida's 13.7 million drivers and 15 million registered car owners. Compl. ¶¶ 6.3, 7.1.3., *id.* In addition, other private plaintiffs have filed similar class actions against State officials in Minnesota, Missouri, and Ohio. See *Kracum* v. *McCormack et al.*, No. 0:07-cv-01462 JMR/FLN (D. Minn. filed Mar. 8, 2007); *Poynter et al.* v. *Vincent et al.*, No. 2:07-cv-04047-NKL (W.D. Mo. filed

---

§ 1983,'" *Lizzi*, 255 F.3d at 137. The DPPA's use of the word "person" must be interpreted in the context of all of its remedial provisions.

Mar. 6, 2007); *Bogard* v. *Morckel et al.*, No. 5:07-cv-00671 (N.D. Ohio filed Mar. 8, 2007).

Individually and in combination, these claims threaten to impose hundreds of billions in liability for the States' implementation of policies and practices alleged to violate the DPPA even though the Act does not authorize such a claim and, indeed, limits enforcement activity challenging State policies and practices to the Attorney General. Equally to the point, the existence of a private cause of action under the DPPA will prevent States from establishing or enforcing any State law or policy that could arguably violate the DPPA. The States generally indemnify employees for fulfilling State law duties and implementing state law and policies. Thus, as a practical matter, States will face potentially bankrupting liabilities when every driver has a claim worth a minimum of $2,500. Certainly, unindemnified State officials could not risk such exposure. Allowing suits for billions against State officials is both absurd and abusive; it is inconceivable that Congress meant to put government officials in such a predicament.

This Court should, accordingly, grant the petition to address whether plaintiffs may bring private causes of action against State officials for their compliance with or implementation of State laws, policies and practices alleged to violate the DPPA.[4]

---

[4] Plaintiffs' claim under § 1983 of the Civil Rights Act is barred for the same reason as the DPPA claim – because the text and structure of the DPPA reveal that individuals have no private right of action against State officials who are implementing State law, policies and practices. *See Gonzaga*, 536 U.S. at 283 ("the inquiries [in actions arising under § 1983 or directly under a statute] overlap in one meaningful respect – in either case we must first determine whether Congress *intended to create a federal right*"); *id* at 285 ("the initial inquiry [in a § 1983 claim] – determining whether a statue confers any right at all – is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statue 'confers rights on a particular class of persons'") (alteration omitted).

II. A SUIT AGAINST A STATE OFFICIAL SEEKING MONEY DAMAGES SOLELY FOR THE OFFICIAL'S COMPLIANCE WITH OR IMPLEMENTATION OF STATE LAW IS BARRED BY THE ELEVENTH AMENDMENT.

The incantation of the term "individual capacity" is not sufficient to transform an official-capacity action into litigation against a private person. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1986). Where, as here, a State official is sued for billions of dollars based on nothing more than his or her compliance with State law and when the beneficiary of the official's action is the State, that lawsuit is one against the State itself as a matter of law. Indeed, other than altering State policy and obtaining State money, there is no point to a massive class action for billions of dollars of relief against a few officials who cannot possibly provide such relief. Plaintiffs' real target is the State. In such an action, any claim for money damages is barred by the Eleventh Amendment. *Seminole Tribe* v. *Florida*, 517 U.S. 44, 72 (1996). The Eleventh Circuit's contrary decision – which looked solely at the individual-capacity label plaintiffs placed on their claims – did not comply with this Court's teachings and conflicts with the approaches adopted by other courts of appeals.

The State officials freely acknowledge that under *Ex Parte Young*, 209 U.S. 123 (1908), plaintiffs generally may seek injunctive relief from State officials to require them to comply with federal law and to preserve the supremacy of federal law. In addition, plaintiffs may generally seek damages from government officials in their individual capacities when the claim is against the individual and not against the State. *Alden* v. *Maine*, 527 U.S. 706, 757 (1999). But, however a complaint is styled – as a claim for injunctive relief or damages or as against officials in their official or individual capacities – it is the federal court that must decide whether that claim is *in actuality* a claim against the state. *Coeur d'Alene*, 521 U.S. at

270. "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Id.* Accordingly, the fact that the plaintiffs here characterize their suit as one seeking money damages from State officials *in their individual capacities* does not govern.

There is a marked tension between the decision below and decisions arising under the analogous statutory structure of the False Claims Act ("FCA"). Like the DPPA, the FCA authorizes claims against any "person" who knowingly violates the Act; and like the DPPA, the FCA excludes States and State agencies from the definition of "person," thus forbidding any FCA claim against the States. See *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). Several courts of appeals have held that plaintiffs may not circumvent the FCA's prohibition of suits against the States by suing State officials in their individual capacities when those officials have simply implemented State law and policies and have not acted for personal gain.

The Eighth Circuit, for example, has held that in determining whether a State official has been sued in his or her individual capacity under the FCA, a court "should look at whether the alleged conduct of the defendant was 'outside of [his] official duties.'" *Gaudineer & Comito*, 269 F.3d at 937 (alteration in original) (quoting *Bly-Magee* v. *California*, 236 F.3d 1014, 1016 (9th Cir. 2001)). The court of appeals first recognized that it "should not rely wholly on 'the elementary mechanics of captions and pleading,'" and then held that the plaintiff had not alleged that the State official engaged in any conduct outside of his official duties, and therefore that the plaintiff had not alleged a claim against the State official in his individual capacity. *Id.* The court pointed out that the plaintiffs "claim against [the State official] in his individual capacity [was] for the same acts it had previously alleged he was performing in his official capacity." *Id.* See also *Smith* v. *United States*, 287 F.2d 299, 303-04 (5th Cir. 1961) (suggesting that FCA claims against government officials in their personal capacities must

contain allegations of personal gain); *United States ex rel. Dunleavy* v. *County of Del.*, 279 F.3d 219, 221 (3d Cir. 2002) (agreeing with the district court that personal benefit is necessary to subject a government to individual liability under the FCA), *vacated on other grounds*, 538 U.S. 918 (2003).

Other courts of appeals have reached similar conclusions under other federal statutes authorizing suits against "persons." For example, both the FLSA and the FMLA define an employer as "any *person* who acts, directly or indirectly, in the interest of an employer." 29 U.S.C. §§ 203(d), 2611(4)(A)(ii)(I) (emphasis supplied). Several courts of appeals have concluded that plaintiff employees may not circumvent the prohibition on claims for money damages from States simply by asserting that the government employees who are their supervisors are "persons" who can be sued in their individual capacities.

Thus, in *Luder* v. *Endicott*, 253 F.3d 1020 (7th Cir. 2001), the plaintiffs sued State officials in their individual capacities seeking back pay based on allegations that "the State of Wisconsin d[id] not share the plaintiffs' interpretation of the [FLSA]." *Id.* at 1024. The Seventh Circuit explained that plaintiffs are "seeking to force the state to accede to their view of the Act and to pay them accordingly." *Id.* The court concluded that while State officials may be "persons" under the Act, "a suit nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state, is, we think, barred." *Id.* at 1023 (emphasis omitted). Indeed, the court observed that "[a]ny other position would be completely unrealistic and would make a mockery of the Supreme Court's heightened sensitivity to state prerogatives." *Id.*

Finally, in both *Lizzi*, and *Montgomery* v. *Maryland*, 266 F.3d 334 (4th Cir. 2001), *vacated on other grounds*, 535 U.S. 1075 (2002), the Fourth Circuit held that individual-capacity suits against State officials as "persons" for backpay under the FMLA are, in reality, suits against the State that are barred by

the Eleventh Amendment. As the court explained, "the state is the real party in interest when an official is sued for damages for official acts under the FMLA." *Id.* at 340 (citing *Lizzi*, 255 F.3d at 136-38). The court based its conclusion "on the fact that private plaintiffs [otherwise] 'would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer.'" *Id.* at 137. See also *Lizzi*, 255 F.3d at 136 ("[t]he complaint made no showing of any ultra vires action taken by any individual employee").

The courts of appeals have held that a State does not become the real party in interest simply because it chooses to indemnify State officials. See, *e.g.*, *Duckworth* v. *Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985) *abrogated on other grounds by Farmer* v. *Brennan*, 511 U.S. 825 (1994). But, a claim against State officials based on their fulfillment of State law obligations, particularly when the damages are so large that they could not conceivably be paid by a State official and when the result would inevitably alter State policy, should be treated as a claim against the State itself – whether or not the complainant labels the claim an individual-capacity claim. See *Edeman* v. *Jordan*, 415 U.S. 651, 663-65 (1974). The fact that this case is a class action challenging a State law that broadly regulates virtually all Florida citizens underlines this point. Moreover, suing State officials for billions is meaningless unless the plaintiffs' real target is the State. It is also abusive of those officials.

In sum, the State is the real party in interest when individual officials are doing nothing more than complying with otherwise constitutional State law or official State policy and the State alone stands to benefit from the official's actions. If what Florida did here had been undertaken by Illinois or Maryland, this litigation would be over. This Court should grant the petition to hold that claims based on such actions by State officials are not individual-capacity claims as a matter of law. The court of appeals' contrary rule, permitting

individual-capacity suits in these circumstances, "adhere[s] to an empty formalism and . . . undermine[s] the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Coeur d'Alene*, 521 U.S. at 270.

III. THE STATE OFFICIALS DID NOT VIOLATE CLEARLY ESTABLISHED LAW AND WERE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW.

Even if plaintiffs could otherwise state a valid claim under the DPPA and § 1983, the State officials were entitled to qualified immunity. Qualified immunity shields public officials from damages claims for actions taken in their individual capacities "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The statutory rights at issue here were not "clearly established." The court of appeals' contrary determination was based on two errors of law. Its decision contravenes this Court's teachings with respect to qualified immunity, as well as the decisions of other courts of appeals, and should be reviewed by this Court.

First, the court of appeals denied the State officials qualified immunity based on their decision to comply with undisputed State law, saying that the State law was irrelevant because the officials should have known that the State law was preempted based on this Court's decision in *Reno*. App. 10a n.3. This back-of-the-hand treatment of State law – and the position of individual State officials confronted with State law obligations that may ultimately be deemed contrary to federal law – is inconsistent with this Court's jurisprudence and a number of decisions by other courts of appeals.

Reno held only that the DPPA was a constitutional exercise of Congress's regulatory power under the Commerce Clause; it did not address the scope of preemption or discuss the

preemption of particular State laws. Indeed, this Court observed that "[t]he DPPA's prohibition of nonconsensual disclosures is . . . subject to a number of statutory exceptions," some of which require disclosure and others of which permit disclosure. 528 U.S. at 145. Moreover, critically here, this Court specifically noted that the DPPA applies different penalties "to be imposed on States and *private actors* that fail to comply with its requirements," and appeared to explain that even a State that maintained a policy or practice of *substantial* noncompliance was subject *only* to a civil penalty imposed by the Attorney General. *Id.* at 146-47 (emphasis supplied). In this setting, the State officials confronted with a conflict between their State law obligations and the DPPA reasonably believed that they were not "private actors"; that there was no private cause of action against them for fulfilling those State law obligations; and that the question whether the State was in "substantial noncompliance" would be addressed by the Attorney General.

This Court has routinely recognized the importance of positive law in assessing whether a government official is entitled to qualified immunity for a constitutional or statutory violation. In *Pierson* v. *Ray*, 386 U.S. 547, 555-57 (1967), the Court held that law enforcement officers were entitled to qualified immunity "for acting under a statute that [the officers] reasonably believed to be valid that was later held unconstitutional." Similarly, in *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999), the Court noted that a Marshals Service policy authorizing the government officials' actions was "important" to the conclusion that those officials were entitled to immunity. Cf. *Hope* v. *Pelzer*, 536 U.S. 730, 744-45 (2002) (denying Alabama officials qualified immunity in part because of a U.S. Department of Justice memorandum condemning Alabama's policy).

Other courts have recognized the import of this Court's teachings and held that, in assessing whether federal law is clearly established, the existence of other laws and policies is

important. See, *e.g.*, *Roska ex rel. Roska* v. *Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003) ("'the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional'") (quoting *Grossman* v. *City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994)); *Connecticut ex rel. Blumenthal* v. *Crotty*, 346 F.3d 84, 102 (2d Cir. 2003) (considering "particularly persuasive" that "the challenged conduct involved enforcement of a presumptively valid statute"); *Sullivan* v. *Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (zoning officials have qualified immunity when they are "simply implementing an established policy of the town").

Where, as here, State law imposes obligations on State officials, the courts should presume that the officials are entitled to qualified immunity. This presumption would be overcome only if it were absolutely clear that the plaintiffs had a federal right that compliance with State law would violate. That is plainly not the case here, where it was entirely uncertain whether plaintiffs even had a private cause of action against the State officials. These State officials were literally torn between obeying State law and defying State law to address the DPPA when that Act did not appear to have any private enforcement mechanism against the State.

Second, the court held that the law governing plaintiffs' claim was "clearly established" because the DPPA made unlawful the State's disclosures of driver's license information without affirmative driver consent. But, it was far from "clearly established" – indeed, no court had ever addressed – whether private plaintiffs have a cause of action against State officials for damages under the DPPA. For precisely this reason, the district court expressly held that the law was not clearly established. See App. 42a. The district court's conclusion should have led the court of appeals to find that the relevant law was not clearly established. See *Wilson*, 526 U.S. at 618 ("[i]f judges . . . disagree on a constitutional question, it

is unfair to subject [officials] to money damages for picking the losing side of the controversy"). The court's refusal to do so was based on a legal error.

Specifically, the court of appeals appeared to believe that the only relevant question for qualified immunity is whether a substantive prohibition of federal law – here, the DPPA – had been violated. This argument totally misapprehends the nature of the qualified immunity defense. The question whether the plaintiffs even have a cause of action against State officials is equally relevant to qualified immunity. See *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) ("[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). The fact that certain conduct is prohibited does not show that plaintiffs have an individual right to money damages against State officials for complying with State law that violates that right. In determining whether an official should have known that his or her actions violated a clearly established statutory right, the Court must examine the entirety of the statutory cause of action. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides the basis for the cause of action sued upon"). Cf. *Starlight Sugar, Inc.* v. *Soto*, 253 F.3d 137, 144-45 (1st Cir. 2001) (holding that, even if the Commerce Clause violation were clearly established, "the applicability of the dormant Commerce Clause to Puerto Rico is disputed, and, thus appellees' attendant constitutional right is not clearly established").

The State officials here were confronted with a State law duty requiring one course of conduct and a federal statute purporting to forbid the conduct required by State law. The Attorney General had not sought to impose penalties upon Florida for substantial non-compliance. In this setting, it is clear that the Florida officials reasonably could decide to fulfill

their State law obligations (and avoid potential criminal prosecution) based on the belief that private plaintiffs did not have an enforceable right to seek damages against State officials for compliance with State law. Put differently, it was far from clearly established that "the text and structure" of the DPPA indicat[ed] that Congress intend[ed] to create new individual rights" against State officials implementing State laws, policies and practices. *Gonzaga*, 536 U.S. at 285-86. Qualified immunity is "intended to provide government officials . . . the ability . . . to anticipate when their conduct may give rise to liability for *damages*." *Anderson*, 483 U.S. at 646 (emphasis supplied) (internal quotation marks and alteration omitted).

When it is not "clearly established" that private parties have any cause of action against government officials, then the relevant federal law is not clearly established and government officials are entitled to qualified immunity, even if a legal prohibition has been violated. This Court should grant the petition to clarify this important element of qualified immunity for government officials.

* * * *

This case poses as sensitive a federalism issue as this Court can confront. Congress imposed liability on the States, which itself makes this a very sensitive problem. To protect State prerogatives, Congress expressly limited the federal government's ability to intrude into the State's administration of its laws and practices to situations where the Attorney General has made the decision that litigation is the only recourse. The holding of the court of appeals that private plaintiffs can strip the States of the clear protection that Congress meant to confer simply by suing State officials individually creates an intolerable situation. This diminishes the standing of the States in our federalist system in a way that Congress most certainly did not intend, which is reason enough for this Court to grant certiorari. The fact that this comes with

a price tag in the tens of billions of dollars makes the case for further review unassailable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL OF FLORIDA
LOUIS F. HUBENER, III
OFFICE OF THE ATTORNEY GENERAL
SCOTT D. MAKAR
SOLICITOR GENERAL
Florida Capitol
400 S. Monroe Street
Tallahassee, FL 32399-6536
(850) 414-3300

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

August 13, 2007

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 06-12614

MARY ANN COLLIER, ARTHUR L. WALLACE,
ROY MCGOLDRICK, ROBERT PINO,
Plaintiffs-Appellants,

v.

FRED O. DICKINSON, III, CARL A. FORD, SANDRA LAMBERT,
MICHAEL D. MCCASKILL, BOYD WALDEN, PHILLIP SHELTON,
DAVID M. PERRYMAN, LAWRENCE J. BILBO,
Defendants-Appellees,

FLORIDA DEPARTMENT OF FINANCIAL SERVICES,
Defendant.

Feb. 12, 2007

Appeal from the United States District Court
for the Southern District of Florida

Before BLACK, BARKETT and KRAVITCH, *Circuit Judges*.

BARKETT, *Circuit Judge*:

Mary Ann Collier, Arthur L. Wallace, Roy McGoldrick, and Robert Pino, as well as the putative class of all other similarly situated individuals (collectively "Plaintiffs"), appeal the dismissal of their Second Amended Complaint against Fred O. Dickinson III, Carl A. Ford, and Sandra Lambert (collectively "Defendants"). Defendants, who are executive-level officials at the Florida Department of Highway Safety & Motor Vehicles ("DHSMV"), were sued in

their individual capacity for selling the personal information that Plaintiffs provided to the DHSMV in order to obtain their drivers' licenses and/or vehicle registrations to mass marketers, in violation of the Driver Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721-2725.

In addition to a direct claim under the DPPA, Plaintiffs also sued for relief under 42 U.S.C. § 1983, which imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." Specifically, Plaintiffs alleged that the sale of personal information violated their constitutional right to privacy, in addition to their rights protected by the DPPA. The district court granted Defendants' motion to dismiss all claims in the complaint on the grounds that Defendants were entitled to qualified immunity.

Qualified immunity offers protection for government officials, acting within their discretionary authority,[1] who are sued in their individual capacities as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73

---

[1] To act within the scope of discretionary authority means that "the actions were (1) undertaken pursuant to the performance of [the official's] duties and (2) within the scope of [his] authority." *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir.1995) (quotation marks and citations omitted). We find no error in the district court's determination that Defendants were acting within their discretionary duties when they sold motor vehicle record information to mass marketers. The parties agree that Defendants are high level executive officials who are required to exercise discretionary authority to develop and implement policy decisions regulating the dissemination of the DHSMV's motor vehicle records. They are essentially responsible for the distribution of motor vehicle record information. Accordingly, the acts complained of—the improper release of the information—were "within, or reasonably related to, the outer perimeter of [Defendants'] discretionary duties." *Harbert Int'l Inc. v. James*, 157 F.3d 1271, 1282 (11th Cir.1998).

L.Ed.2d 396 (1982) (citation omitted). We review a district court's grant of a motion to dismiss based on qualified immunity *de novo* and accept well-pleaded allegations as true, construing facts in the light most favorable to the plaintiffs. *Maggio v. Sipple*, 211 F.3d 1346, 1350 (11th Cir.2000).

To ascertain whether an official is entitled to qualified immunity we must first evaluate whether Plaintiffs' allegations, if true, establish a violation of a constitutional or statutory right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second, if Plaintiffs' allegations, accepted as true, establish a violation of a constitutional or statutory right, we must ask whether "the [federal] right [that was violated] was clearly established" at the time of the alleged conduct. *Id.* Accordingly, we conduct this two part inquiry as to each of the two claims presented by the plaintiff: those filed pursuant to Section 1983 and the direct claim for the violation of the DPPA.

I. Constitutional Right To Privacy

Plaintiffs first allege that they are entitled to relief under Section 1983 because Defendants violated their constitutional right to privacy when they released their personal information to mass marketers without their consent. We find that, under our precedent, the district court did not err in answering the first *Saucier* question—whether a constitutional right had been violated—in the negative. *See Pryor v. Reno*, 171 F.3d 1281, 1288 n. 10 (11th Cir.1999), *rev'd on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000). We are bound by *Pryor* and cannot, as a panel, revisit this issue. *See Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir.2003) ("A prior panel decision of this Court is binding on subsequent panels and can be overturned only by the Court sitting en banc.") (citation omitted).

Accordingly, because Plaintiffs' allegations do not establish a constitutional violation under our precedent, there is no

need to reach the second *Saucier* question of whether the law was clearly established at the time of the alleged conduct. The district court did not err in dismissing the constitutional claim under Section 1983 as barred by qualified immunity.

II. Statutory Right To Privacy

Plaintiffs make two claims asserting that their statutory right to privacy was violated by Defendants' conduct. One is a direct claim pursuant to the DPPA. The other is a claim pursuant to Section 1983, which imposes liability on anyone who, under color of state law, deprives a person of any rights secured by either the Constitution or federal laws. 42 U.S.C. § 1983. Accordingly, we must first determine whether the DPPA directly furnishes Plaintiffs with a cause of action. We must also determine whether the rights provided by the DPPA are separately enforceable under Section 1983.

1. Does The DPPA Create A Statutory Right To Privacy In Motor Vehicle Record Information That Is Enforceable Directly Under The Statute?

Count II of the complaint asserts a claim directly under the DPPA, and alleges that Defendants violated the statute when they sold motor vehicle record information to mass marketers without Plaintiffs' consent. The DPPA prohibits the release of personal information contained in individual motor vehicle records unless the State has obtained the express consent of the person to whom such personal information pertains.[2] The

---

[2] 18 U.S.C. § 2721(a) states:

> In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity: (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or (2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in con-

statute provides a two part remedy. First, the statute provides enforcement against the states:

> Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

18 U.S.C. § 2723(b).

In addition, 18 U.S.C. § 2724 provides a cause of action against individuals as follows:

> (a) Cause of action.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter *shall be liable to the individual to whom the information pertains, who may bring a civil action* in a United States district court.
>
> (b) Remedies—The court may award—(1) actual damages, but not less than liquidated damages in the amount

---

nection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

Under 18 U.S.C. § 2721(b), personal information may be disclosed under certain circumstances, including:

> (11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.
>
> (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.
>
> (13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

> of $2,500; (2) punitive damages upon proof of willful or reckless disregard of the law; (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724 (emphasis added).

We find that the plain language of the DPPA clearly, unambiguously, and expressly creates a statutory right which may be enforced by enabling aggrieved individuals to sue persons who disclose their personal information in violation of the DPPA. Accordingly, if the acts alleged by Plaintiffs are taken to be true—that Defendants sold personal information without their consent—then Count II of the complaint states a cause of action under the DPPA.

2. Is The Statutory Right To Privacy Created By The DPPA Enforceable Separately Under Section 1983?

Plaintiffs also allege that they are entitled to the relief provided by Section 1983 because, by releasing their personal information to mass marketers without their consent, Defendants violated the statutory right to privacy granted to them by the DPPA. Defendants argue that, even if the plain language of the statute grants individuals a right to sue persons who violate it, the DPPA does not also create an enforceable right under Section 1983 because the remedial scheme set forth in the statute is inconsistent with additional relief under Section 1983.

It is settled that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). For a federal statute to be enforceable under Section 1983, three conditions must be satisfied. First, Congress must have intended that the enforcement provisions of the statute focus on benefiting the plaintiff individually, rather than focusing on benefiting a group or making system-

wide changes. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). Second, the right "protected by the statute [must not be] so vague and amorphous that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41, 117 S.Ct. 1353 (quotation and citation omitted). Third, the provision giving rise to the right "must unambiguously impose a binding obligation on the States" in that it is "couched in mandatory, rather than precatory, terms." *Id.* at 341, 117 S.Ct. 1353 (citation omitted). If all three conditions are satisfied, there exists a rebuttable presumption that the statute is enforceable under Section 1983. This presumption can only be refuted if Congress expressly or impliedly created "a comprehensive enforcement scheme [in the statute in question] that is incompatible with individual enforcement under § 1983." *Id.*

We have no hesitancy in finding that the plain language of the DPPA clearly satisfies all three conditions to make it enforceable under Section 1983. First, the enforcement provisions of the statute unambiguously focus on benefiting individuals, rather than focusing on benefiting a group or making system-wide changes. The statute makes the official who disobeys the law "liable *to the individual* to whom the information pertains, who may bring a civil action in a United States district court." 18 U.S.C.A. § 2724(a) (emphasis added). Second, it can hardly be said that the protections offered by the statute are "so vague and amorphous that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41 (quotation and citation omitted). Rather, the protections offered by the statute are clear and specific. The language of Sections 2721(b)(11)-(13) unambiguously requires the consent of individuals before their motor vehicle record information may be released, and Section 2724(a) unambiguously states that an individual who knowingly violates the statute shall be liable to the individuals to whom the information pertains in an action in federal district court. The

language sets forth the contours and limits of the right clearly, and the right is easily enforceable by courts. Third, the statutory language is mandatory in that it requires that the states obtain the consent of the persons whose information is to be disseminated.

Notwithstanding the clarity of the statute, Defendants argue that Section 1983 relief is precluded because Congress intended to create "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *Blessing*, 520 U.S. at 341, 117 S.Ct. 1353 (citation omitted), when it authorized the United States Attorney General to enforce the statutory rights against the states and provided an individual right of action under the DPPA against persons violating the statute. We fail to see such incompatibility.

Rarely is a "remedial scheme sufficiently comprehensive to supplant § 1983." *Id.* at 347, 117 S.Ct. 1353. Indeed, to support the conclusion that Section 1983 relief is precluded, the scheme set forth by Congress must be so detailed, complex, or comprehensive, such that it is nonsensical to hold that Congress intended Section 1983 relief to be available. *See id.* (discussing two cases in which the Supreme Court held that remedial provisions precluded Section 1983 relief, one of which included so many options for relief that it was "hard to believe" that Congress intended to preserve Section 1983 relief, and the other provided such detailed procedures for administrative review that it would have defeated the purpose of the statute to enable plaintiffs to bypass the administrative process).

Rather than conflicting, we find the relief offered by the DPPA and Section 1983 to be complementary. The DPPA did not create "so many specific statutory remedies" for individual enforcement that it is "hard to believe that Congress intended to preserve the § 1983 right of action." *Blessing*, 520 U.S. at 347, 117 S.Ct. 1353. To ensure compliance with the statute, the DPPA provides a remedy against the

state and a remedy against individuals who disregard the law. There is nothing in the statute to suggest that Congress intended to exclude Section 1983 relief. Thus, we find that the district court erred in concluding that there was no statutory right to privacy enforceable under Section 1983.

3. Was The Law Clearly Established At The Time Of The Alleged Conduct?

Having found that the statutory rights created by the DPPA are enforceable both directly and under Section 1983, we must now ask whether the law was sufficiently established to have provided fair warning to Defendants that they were violating the law. *Hope v. Pelzer*, 536 U.S. 730, 731, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Brosseau v. Haugen*, 543 U.S. 194, 198-199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). This inquiry involves evaluating whether a reasonably competent public official would have known that his actions were prohibited by the law at the time he engaged in the conduct in question. *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. The standard is one of objective reasonableness.

We find that the plain language of the statute and the case law gave clear notice to Defendants that releasing the information in question violated federal law. The words of the DPPA alone are "specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity." *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir.2002) (holding that statutory language alone, even in the "total absence of case law" can be sufficient to provide fair notice).

Moreover, the case law defining the reach of the DPPA gave fair notice to Defendants. In evaluating the DPPA, in both its pre- and post-amendment form, the United States Supreme Court stated that:

> [Prior to October 9, 1999,] the DPPA provided that a DMV could obtain that consent either on a case-by-case

> basis or could imply consent if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity. § 2721(b)(11), (13), and (d). However, Public Law 106-69, 113 Stat. 986, which was signed into law on October 9, 1999, changed this "opt-out" alternative to an "opt-in" requirement. Under the amended DPPA, States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but *must rather obtain a driver's affirmative consent to disclose the driver's personal information* for use in surveys, marketing, solicitations, and other restricted purposes.

Reno v. Condon, 528 U.S. 141, 144-45, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000) (emphasis added) (citations omitted). The case law defining the statute's scope could be no clearer.[3] We find the statutory right to privacy in motor vehicle record information was clearly established at the time of Defendants' alleged conduct, giving them fair notice that their alleged conduct violated federal law.

III. Conclusion

In light of the foregoing analysis, Defendants are not entitled to qualified immunity on the portion of Count I that asserts a violation of the DPPA, nor on Count II in its

---

[3] Defendants' argument that there was conflicting state law is unavailing. The law was clear at the relevant time that the DPPA preempted any conflicting state law that regulates the dissemination of motor vehicle record information. *Condon*, 528 U.S. at 151, 120 S.Ct. 666 (holding that "[t]he DPPA regulates the States as the owners of data bases" and "regulates the universe of entities that participate as suppliers to the market for motor vehicle information."). Accordingly, Defendants were bound to follow the mandates of the DPPA, even though a conflicting state law may have existed.

entirety, and remand for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

[Filed MAR 30, 2006]

Case Number: 04-21351-CIV-MARTINEZ-BANDSTRA

MARY ANNE COLLIER, ARTHUR L. WALLACE,
ROY MCGOLDRICK, and ROBERT PINO,
Plaintiffs,

vs.

FRED O. DICKINSON III, CARL A. FORD, and
SANDRA LAMBERT,
Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

THIS CAUSE came before the Court upon the Defendants' Motion to Dismiss the Second Amended Complaint (D.E. No. 69). The Plaintiffs in this lawsuit are individuals who own one or more vehicles registered in the State of Florida and have Florida driver licenses, as well as the putative class of all other similarly situated individuals. The Plaintiffs' two-count Second Amended Complaint (D.E. 65) ("Complaint"), which is the operative complaint, sues three Defendants, who are each executive-level officials at the Florida Department of Highway Safety & Motor Vehicles ("DHSMV"), a Florida state administrative agency. Defendants Dickinson, Ford, and Lambert (collectively "Defendants") are being sued in their individual capacity for: 1) alleged violations of 42 U.S.C. § 1983, and 2) alleged violations of the Driver Privacy Protection Act ("DPPA" or "Act"), 18 U.S.C. § 2721 *et seq.*

The allegations arise from the DHSMV's compilation and sale of personal information related to driver licenses and motor vehicle registrations to various third parties for use in bulk distribution in surveys, marketing, or solicitations. In essence, Plaintiffs allege that Defendants developed policies at the DHSMV that ignored the congressional requirements contained in the DPPA, which regulates the release and sale of driver records to third parties and requires the explicit consent of individuals in order to release certain records. Plaintiffs assert that from June 1, 2000 until September 30, 2004, as a result of policies developed by Defendants, driver records were released by the DHSMV to third parties in contravention of the DPPA. On the other hand, Defendants argue that in developing the policies of the DHSMV they were bound to follow the language of the Florida Constitution, as implemented by Florida state legislation.

Defendants' Motion to Dismiss, Plaintiffs' Response in Opposition, Defendants' Reply, and the associated memoranda, attempt to open a pandora's box of constitutional issues and unnecessary arguments regarding the DPPA. This Court declines to accompany the parties on their wild ride through constitutional law. However, Defendants' motion to dismiss appropriately raises the defense of qualified immunity as to both counts of the Complaint. As is discussed in this Order, this Court finds that, under an established body of case law, both Plaintiffs' claim for alleged violations of constitutional and statutory rights pursuant to § 1983 and Plaintiffs' direct statutory claim under the civil action provision of the DPPA should be barred according to principles of qualified immunity. Thus, Defendants' motion to dismiss is granted in part, and this case is dismissed.

I. BACKGROUND

A. Relevant Factual Background

According to the Complaint, Plaintiffs have owned one or more vehicles registered with the DHSMV and have held

Florida driver licenses issued by the DHSMV. (D.E. No. 65 at ¶ 4). To register their vehicles and obtain driver licenses, Plaintiffs were required to, and did, provide the DHSMV with certain "personal information," as defined in the DPPA, *Id.* The DHSMV entered this personal information into a computer database of motor vehicle records maintained and administered by the DHSMV, which contains personal information of all licensed drivers and registered motor vehicle owners in the State of Florida. *Id.*

Defendant Fred O. Dickinson III ("Dickinson") is the Executive Director of the DHSMV (D.E. No. 65 at ¶ 5). Defendant Carl A. Ford ("Ford") is the Director of the Division of Motor Vehicles, a branch of the DHSMV. *Id.* at ¶ 6. Defendant Sandra Lambert ("Lambert") is the Director of the Division of Driver Licenses, a branch of the DHSMV. *Id.* at ¶ 7.[1] Plaintiffs allege that during the period commencing June 1, 2000, and continuing to the present, Defendants, in their individual capacity, knowingly, repeatedly, and without Plaintiffs' consent, took Plaintiffs' "personal information," which had been maintained by the DHSMV, compiled and reformatted it into customized mailing lists, and sold these lists to various third parties for bulk distribution for surveys, marketing, solicitations, or other purposes not permitted by the DPPA. (D.E. No. 65 at ¶ 11). The information at issue is identified in the Complaint as "personal information," as defined by Florida Statute § 119.07(3)(aa) and by the DPPA, 18 U.S.C. § 2725. *Id.* at ¶ 4. The Complaint alleges that Defendants' sale of Plaintiffs' personal information has resulted in the State of Florida receiving over twenty-seven million dollars ($27,000,000.00) per year since June 1, 2000. *Id.* at ¶ 13.

---

[1] This Court takes judicial notice that Defendants are still each employed in the capacities described in the Complaint, Department Overview, Florida Department of Highway Safety & Motor Vehicles, http://www.hsmv.state.fl.us/html/overview.html. (last visited March 28, 2006).

B. Background on the Driver Privacy Protection Act

This Court first provides general background on the DPPA and discusses the Supreme Court's sole decision involving the constitutionality of the DPPA, *Reno v. Condon*, 528 U.S. 141, 144 (2000).[2] In that case, the Supreme Court explained that the DPPA establishes a regulatory scheme that restricts a State's ability to disclose a driver's personal information without the driver's consent. *Id.* The DPPA generally prohibits any State department of motor vehicles ("DMV"), or officer, employee, or contractor thereof, from "'knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.'" *Id.* (quoting 18 U.S.C. § 2721(a)). The DPPA defines "'personal information'" as any information "'that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information,'" but not including "'information on vehicular accidents, driving violations, and driver's status.'" *Condon*, 528 U.S. at 144 (quoting 18 U.S.C. § 2725(3)). A "'motor vehicle record'" is defined as "'any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles.'" *Condon*, 528 U.S. at 144 (quoting 18 U.S.C. § 2725(1)).

The DPPA's ban on disclosure of personal information does not apply if drivers have consented to the release of their data. When the Supreme Court last considered the DPPA in *Reno v. Condon*, the Court noted that at the time it granted

---

[2] As is discussed *infra*, the extent to which *Reno v. Condon* establishes the constitutionality of the DPPA and the operation of its liability provisions is germane to a determination of the qualified immunity of the Defendants.

certiorari in that case, "the DPPA provided that a DMV could obtain that consent either on a case-by-case basis or could imply consent if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity." *Id.* However, the Court noted that an amendment to the Act, Public Law 106-69, 113 Stat. 968, which was signed into law on October 9, 1999, "changed this 'opt out' requirement into an 'opt-in requirement.'" *Id.* The Court further noted, "[u]nder the amended DPPA, States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.*

The Court also explained that the DPPA's provisions do not apply solely to States. The Act also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a State DMV. *Id.* at 146 (citing 18 U.S.C. § 2721(c)). The Court further noted that the DPPA establishes several penalties to be imposed on states and private actors that fail to comply with its requirements. *Id.* The Act makes it unlawful for any "person" knowingly to obtain or disclose any record for a use that is not permitted under its provisions, or to make a false representation in order to obtain personal information from a motor vehicle record. *Id.* (citing 18 U.S.C. §§ 2722(a) and (b)). Most notably for the purposes of the instant case, the Supreme Court noted, closely tracking the language of the Act, that any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use other than those specifically permitted by the DPPA may be subject to liability in a civil action brought by the driver to whom the information pertains. *Id.* (citing 18 U.S.C. § 2724). Furthermore, and again closely tracking the language of the

statute, the Court noted: "While the DPPA defines 'person' to exclude States and state agencies, § 2725(2), a state agency that maintains a 'policy or practice of substantial noncompliance' with the Act may be subject to a civil penalty imposed by the United States Attorney General of not more than $5,000 per day of substantial noncompliance. § 2723(b)." *Id.* (citations in original).

In *Condon*, the State of South Carolina and its Attorney General had challenged the constitutionality of the DPPA and alleged that the Act violates the Tenth and Eleventh Amendments to the United States Constitution. *Id.* at 147. The District Court in that case concluded that the Act is incompatible with the principles of federalism inherent in the Constitution's division of power between the States and the Federal Government. *Id.* The Court of Appeals for the Fourth Circuit affirmed, concluding that the Act violates constitutional principles of federalism. *Id.* However, the Supreme Court reversed the Fourth Circuit Court of Appeals.

The Supreme Court began its analysis in *Condon* by agreeing with the United States' contention that the DPPA was a proper exercise of Congress' authority under the Commerce Clause of the United States. *See id.* at 148. The Court explained:

> The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

Id. The Court then considered the argument that the DPPA is inconsistent with the principles of federalism. The Court

noted: "In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment." *Id.* at 149 (referring to *New York v. United States*, 505 U.S. 144; *Printz v. United States*, 521 U.S. 898).

The Supreme Court specifically addressed South Carolina's argument that the DPPA "'thrusts upon the States all of the day-to-day responsibility for administering its complex provisions,' and thereby makes 'state officials the unwilling implementors of federal policy,'" *Id.* (quoting Brief for Respondents at 10-11). The Supreme Court, relying on its decision in *South Carolina v. Baker*, 485 U.S. 505 (1988), disagreed that the DPPA "violates the principles laid down in either *New York* or *Printz*." *Id.* at 150. The Supreme Court explained:

> Like the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

Id. at 151.

In terms of the role of the DPPA in the context of Florida public records law, the Eleventh Circuit's recent decision in *Kehoe v. Fidelity Federal Bank & Trust* provides an excellent historical overview. 421 F.3d 1209, 1210-13 (11th Cir. 2005), *cert. denied*, 547 U.S. ___ (March 27, 2006). The Eleventh Circuit explained:

> In 1994, Congress enacted the DPPA to limit the release of an individual's personal information contained

in his driver's license record to those who had a legitimate and lawful need for the information, Originally, the DPPA implemented an opt-out procedure for driver's license information disclosed for marketing purposes. Under the opt-out procedure, a state could release or sell an individual's driver's license information without the individual's permission so long as the individual was given an opportunity to opt out by requesting that the information not be released.

On October 9, 1999, Congress amended the DPPA to require an opt-in procedure.[3] The effective date of this amendment was June 1, 2000. As a result of this amendment, a state's department of motor vehicles cannot disclose an individual's driver's license information without express permission from the individual about whom the information pertains. Forty-nine states immediately passed legislation to ensure compliance with this amendment to the DPPA. Florida was the only state that did not immediately comply. Instead, Florida waited until May 13, 2004, to amend its public records statute to comply with the DPPA. See Fla. Stat. § 119.07(3)(aa)(12); 2004 Fla. Sess. Law Serv. 2004-62 (West).[4]

Id. at 1210. As is discussed *infra*, Plaintiffs' Complaint attempts to hold Defendants individually liable for damages allegedly resulting from Defendants' role in implementing DHSMV policies that were inconsistent with federal law.

---

[3] Plaintiffs' Complaint refers to this 1999 amendment as the "Shelby Amendment." See (D.E. No, 65 at ¶ 10).

[4] Furthermore, in a recent denial of certiorari, the Supreme Court noted: that ". . . Florida—alone among the States— [did] not immediately [amend] its law to comply with Act." *Kehoe v. Fidelity Federal Bank & Trust*, 547 U.S. __ (March 27, 2006) (Scalia, J., concurring).

II. LEGAL STANDARD OF REVIEW

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court must accept the allegations of the complaint as true. *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999). Moreover, the complaint must be viewed in the light most favorable to the plaintiff. *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986). To warrant a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, it must be "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. State of Ala.*, 30 F.3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Nonetheless, to survive a motion to dismiss, a plaintiff must do more than merely label his or her claims. *Blumel v. Mylander*, 919 F. Supp. 423, 425 (M.D. Fla. 1996). Thus, dismissal of a complaint or a portion thereof is appropriate when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. *Marshall County Bd. of Educ.*, 992 F.2d 1171, 1174 (11th Cir. 1993). Furthermore, the Eleventh Circuit has clearly stated that "the court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Id.* (citing *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1539 (11th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991); *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

III. DISCUSSION

A. Overview of Defendants' Motion to Dismiss

Defendants move to dismiss the Complaint on the basis of the following arguments: 1) the Eleventh Amendment bars this action; 2) Plaintiffs have no private right of action under the DPPA to challenge the release of records arising from

departmental policy or state law;[5] 3) the DPPA claim is defective because Plaintiffs failed to plead actual damages,[6] and 4) Defendants are entitled to qualified immunity. *See generally* (D.E. No. 69).

It is a "well established principle of constitutional adjudication that courts should avoid deciding constitutional issues that need not be resolved in order to determine the rights of the parties." *See Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190, 1210 (11th Cir. 1991), *cert. denied*, 500 U.S. 942 (1991) (citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-72 (1947); *Searcey v. Crim*, 815 F.2d 1389, 1394-95 (11th Cir. 1987)). As is discussed *infra*, principles of qualified immunity resolve the instant case, and it is not necessary for this Court to evaluate the constitutionality of various aspects of the DPPA.

B. General Discussion of Principles of Qualified Immunity

Federal courts have applied the common law defense of qualified immunity in the context of both alleged constitutional and statutory violations pursuant to § 1983 and in the context of direct causes of action under federal statutes. This Court first discusses general principles of qualified immunity that are applicable both in the context of actions pursuant to § 1983 and actions directly under federal statutes.

For executive branch officials in both state government and federal government, the form of immunity once known as "good faith" immunity and now called "qualified" immunity is generally deemed sufficient to vindicate the important

---

[5] This argument is addressed in Sections III(D) and (E) of this Order.

[6] This argument is moot in light of the Eleventh Circuit's clear holding in *Kehoe v. Fidelity Federal Bank & Trust* that "[a] plaintiff need not prove actual damages to recover liquidated damages for a violation of the DPPA." 421 F.3d 1209, 1217 (11th Cir. 2005), *cert. denied*, 547 U.S. __ (March 27, 2006). In a Notice to the Court, the Defendants appear to concede the point. (D.E. No. 76).

public interest in allowing government officials to do their work without undue fear of being haled into court for perceived missteps. *Cullinan v. Abramson*, 128 F.3d 301, 308 (6th Cir. 1997) (citing *Butz v. Economou*, 438 U.S. 478, 507 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974)). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Thus, the Supreme Court has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

The Supreme Court has noted the difficulty of balancing the reality that an action for damages may offer the only realistic avenue for vindication of an official's abuse of office with the fact that there are social costs associated with claims against a public official. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The Court has explained that "[t]hese social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* Furthermore, "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.* (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d. Cir 1949), *cert. denied*, 339 U.S. 949 (1950)).

The Supreme Court clarified the standard for evaluating qualified immunity in *Harlow v. Fitzgerald*, where it rejected the inquiry into state of mind in favor of a wholly objective standard. *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (explaining *Harlow v. Fitzgerald*). The Supreme Court in *Harlow* held that officials "are shielded from liability for civil

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (citing *Harlow*, 457 U.S. at 818). The Court noted that: "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.'" *Id.* (quoting *Harlow*, 457 U.S. at 818). The Court explained that this standard "should avoid excessive disruption of government and permit the resolution of many insubstantial claims."[7] *Harlow*, 457 U.S. at 818. It further explained the application of the objective reasonableness standard:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful . . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Id.

Supreme Court decisions subsequent to *Harlow v. Fitgerald* further explained the practical need for qualified immunity for executive level government officials in particular, who "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis*, 468 U.S. at 196. The Court noted:

> These officials are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such

---

[7] This Court recognizes that *Harlow* was decided in the context of a motion for summary judgment, as opposed to a motion to dismiss. However, federal courts have explained that qualified immunity issues should be resolved as early as possible. *See Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001). This Court finds that *Harlow*'s rationale is applicable to the instant case.

> flux that officials can only comply with or enforce them selectively. In these circumstances, officials should not err always on the side of caution. Officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.

Id. (internal quotation marks and citations omitted).

In *Anderson v. Creighton*, the Supreme Court explained that the operation of the objective reasonableness standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639. It explained that applying the objective reasonableness test to more abstract rights increases the risk of undermining the purpose of qualified immunity. *See id.* The Court suggested a functional approach to the proper scale of "legal rule" to be applied:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (internal citations omitted). More recently, in the context of a constitutional right, the Supreme Court has noted: "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Hope v. Pelzer*, 536 U.S.730, 740 (2002). The Court indicated that the "salient question" is whether the "state of the law" at the time of the conduct giving rise to the suit gave the official in question "fair warning" that his or her conduct was in violation of a constitutional or statutory right. *See id.*

C. *Analysis of Whether Defendants' Conduct was Within the Scope of Their Discretionary Authority*

When applying qualified immunity principles in the context of an alleged constitutional or statutory right pursuant to § 1983, or an alleged statutory violation directly under a federal statute, the Court must first determine whether the defendant public official has proved that he or she was acting within the scope of his or her discretionary authority when the alleged wrongful act occurred. *See Tapley v. Collins*, 211 F.3d 1210, 1214 (11th Cir. 2000); *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1294-95 (11th Cir. 1998); *Cullinan*, 128 F.3d at 304-05. To receive qualified immunity, the public official "must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). The Eleventh Circuit has clearly explained that "if and only if" the defendant meets this initial burden will the burden shift to the plaintiff to establish that the defendant violated clearly established law. *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir. 1998). The Eleventh Circuit in *Harbert* further defined this initial inquiry:

> To determine whether the defendant has discharged his burden, it is critical to define properly the inquiry. The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an "untenable" tautology. "Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties. The scope of immunity 'should be determined by the relation of the [injury] complained of to the duties entrusted to the officer.'"

Id. (internal citations omitted). Furthermore, the Eleventh Circuit in *Harbert* explained:

> Exactly what will suffice to establish such objective circumstances will . . . vary in proportion to the degree of discretion inherent in the defendant's office. Such objective circumstances necessarily must encompass the factual context within which the complained-of conduct took place. But also appropriate is a showing by the defendant of facts relating to the scope of his official duties—e.g., a showing of the circumstances through which he initially came to believe that his lawful authority included within its scope actions of the type that are complained of by the plaintiff.

Id. at 1282 (quoting *Barker v. Norman*, 651 F.2d 1107, 1124-25 (5th Cir. Unit A July 1981)).

With these principles in mind, this Court now considers whether each of the three Defendants were acting within the scope of their discretionary authority. A careful analysis of the Complaint leads to the inevitable conclusion that each of the Defendants were acting within his or her discretionary authority with regard to both the § 1983 and DPPA claims. The two counts in Plaintiffs' Complaint do not differentiate between the different Defendants. *See* (D.E. No. 65 at ¶¶ 24-35). Count I alleges that Defendants' "policies, procedures, practices and acts," as described in the Complaint "have subjected Plaintiffs and the Class Members, to the deprivation of their rights of privacy, as secured to them through the United States Constitution and the DPPA, and are therefore in violation of 42 U.S.C. § 1983." (D.E. No. 65 at ¶ 25). Similarly, Count II alleges that the Defendants have been "knowingly obtaining, disclosing, or using 'personal information' as defined in 18 U.S.C. § 2725(4), for purposes not permitted by the DPPA," as well as disclosing "personal information and highly restricted personal information for purposes not permitted by the DPPA without the express consent of the

persons to whom the information pertains." (D.E. No. 65 at ¶¶ 30-32).

The general gravamen of both counts is that Defendants "authorized, directed, ratified, approved, acquiesced in, committed or participated in" the development of policy decisions at the DHSMV that resulted in the compilation and formatting of personal information from motor vehicle records, which was ultimately sold to various third parties for bulk distribution. *See* (D.E. No. 65 at ¶ 11). This Court must first determine whether these actions, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of the Defendants' discretionary duties. *Harbert Int'l, Inc.*, 157 F.3d at 1281. This Court finds that, taking the allegations of the Complaint as true, as it must, each Defendant was a high level executive official who was required to exercise discretionary authority to develop and implement policy decisions that regulated the release and distribution of driver records through the DHSMV.

The Complaint clearly states that Defendant Dickinson "is ultimately in charge of all personal information contained in the driver license and motor vehicle registration records of approximately 15 million Florida residents." (D.E. No. 65 at ¶ 12(A)(i)). His "duties include overseeing all of the [DHSMV's] operations, departmental policy making, budgetary matters, and ensuring the Department's compliance with applicable laws and regulations." *Id.* at ¶ 12(A)(iv).

Similarly, the Complaint states that Defendant Ford: "[I]s in charge of motor vehicle records for the state of Florida. He oversees approximately 500 employees and supervises all operations of the Division [of Motor Vehicles], including the section that processes public information requests. He is responsible for the Division's budget, including the duty to ensure that adequate funding is available to pay for the costs of the Division's operations." *Id.* at ¶ 12(B)(ii).

Defendant Sandra Lambert's "duties and responsibilities include the overall operations of the Division [of Driver Licenses], issuing of driver licenses, maintaining the records of driver licenses in Florida, monitoring of the Court system and the overall budget of the Division as well as strategic and long-range planning." *Id.* at ¶ 12(C)(iii). Her "responsibilities include maintaining the information obtained from a Florida driver when the driver applies for a Florida driver's [sic] license." *Id.* at ¶ 12(C)(iv). Lambert "directs a major division of the [DHSMV]" and her responsibilities include "implementation of new or revised laws to insure compliance." *Id.* at ¶ 12(C)(v-vi).

The allegations of the Complaint, which must be taken as true, indicate that, at all times relevant to this action, each Defendant was employed in an executive-level positions that required him or her to participate in the development of policy decisions involving the compilation and formatting of personal information from motor vehicle records, and the sale to third parties by the DHSMV. *See Pemco Aeroplex, Inc.*, 195 F.3d at 1236; (D.E. No. 65). Thus, this Court concludes that the allegations of the Complaint, when read in conjunction with the Defendants' memoranda of law, clearly establish that the Defendants have met their burden of showing that their conduct was undertaken pursuant to their respective duties and that they were acting within the scope of their discretionary authority when the alleged violation of constitutional or statutory right occurred. *See Harbert Int'l, Inc.*, 157 F.3d at 1282; *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 830 (11th Cir. 1982).[8]

---

[8] This Court notes that the Eleventh Circuit's discussion in *Harbert Int'l, Inc.* was in the context of a motion for summary judgment. However, the Eleventh Circuit has also noted the appropriateness of resolving qualified immunity at the motion to dismiss phase. *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001). This Court notes that in the instant case the Plaintiffs' Complaint clearly establishes that the Defendants' conduct

Since the Defendants have demonstrated that their conduct was within the scope of their discretionary authority, this Court now applies the appropriate analysis for a qualified immunity defense to each count of the Complaint. Because this Court observes that the Eleventh Circuit has engaged in a somewhat different qualified immunity analysis in the context of: 1) alleged violations of a constitutional and statutory rights *under § 1983*, and 2) alleged violations of statutory rights *under a federal statute*, this Court completes its analysis of Count I (§ 1983 claims) and Count II (DPPA claim under 18 U.S.C. § 2724) separately.

D. Application of Qualified Immunity to Plaintiffs' § 1983 Claim of Constitutional and Statutory Rights

Plaintiffs allege that Defendants' "policies, procedures, practices and acts," as described in the Complaint "have subjected Plaintiffs and the Class Members, to the deprivation of their rights of privacy, as secured to them through the United States Constitution and the DPPA, and are therefore in violation of 42 U.S.C. § 1983." (D.E. No. 65 at ¶ 25). This Court first applies qualified immunity principles to Plaintiffs' 1983 claim under a constitutional "right to privacy" and then applies qualified immunity principles to Plaintiffs' § 1983 claim under the DPPA. *See* (D.E. No. 65 at ¶ 25).

The Eleventh Circuit has clearly established a two-part test for determining whether qualified immunity applies to a § 1983 claim for a violation of a constitutional right:

> The Supreme Court has set forth a two-part test for the qualified immunity analysis. The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a

---

was within the scope of their discretionary duties, and, thus, Defendants' claim that their actions were in the scope of their discretionary duties is more than a "bald assertion." *See Espanola Way Corp.*, 690 F.2d at 830.

> constitutional violation. If a constitutional right would have been violated under the plaintiff's version of the facts, the next, sequential step is to ask whether the right was clearly established.

Vinyard, 311 F.3d at 1346 (internal citations and quotations omitted).

This Court first must consider whether the Plaintiffs' allegations that Defendants developed policies that were inconsistent with the DPPA and resulted in the improper release of driver records to third parties, if true, resulted in a violation of the Plaintiffs' constitutional right to privacy. The Eleventh Circuit has previously held that "there is no constitutional right to privacy in motor vehicle record information which the DPPA enforces." *Pryor v. Reno*, 171 F.3d 1281, 1288 n.10 (11th Cir. 1999), *rev'd other grounds*, 528 U.S. 1111 (2000) (vacating judgment and remanding for further consideration in light of *Reno v. Condon*). This Court finds that the Eleventh Circuit's rationale in *Pryor v. Reno* is persuasive.

The Eleventh Circuit has explained: "[T]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *James v. City of Douglas*, 941 F.2d 1539, 1544 (11th Cir. 1991) (quoting *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (footnotes omitted)). In *James v. Douglas*, the Eleventh Circuit "acknowledged a constitutional right to privacy *only for intimate personal information given to a state official in confidence*." *Pryor*, 171 F.3d at 1288 n.10 (citing *James*, 941 F.2d at 1544). Similarly, the Eighth Circuit, when considering a § 1983 action against police officers and a city for disclosure of information that the plaintiff had pleaded guilty, explained that "protection against public dissemination of information is limited and extends

only to highly personal matters representing 'the most intimate aspects of human affairs.'" *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (quoting *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988), *cert. denied*, 488 U.S. 854 (1988)). The Eighth Circuit further noted: "'[T]o violate [a person's] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information.'" *Id.* (quoting *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993)).

In the instant case, Plaintiffs allege that Defendants released "personal information" necessary for obtaining a driver license. See (D.E. No. 65 at 4). While this Court recognizes that the information in the Complaint is not insignificant, and individuals obviously have an interest in avoiding the dissemination of such information, this Court concludes that information contained in motor vehicle records does not constitute "intimate personal information given to a state official in confidence" that warrants a constitutional right to privacy. Thus, this Court concludes that there is no constitutional right to privacy in motor vehicle record information that the DPPA enforces. *See Pryor*, 171 F.3d at 1288 n.10.

In addition to allowing plaintiffs to bring a cause of action under § 1983 for the alleged violation of a constitutional right, the Supreme Court has held that certain federal laws may be directly enforced through § 1983. *See generally Maine v. Thiboutot*, 448 U.S. 1 (1980). However, in order to have a viable cause of action under § 1983 based on the violation of a federal statute, a plaintiff must establish that the statute allegedly violated gives the plaintiff enforceable rights. *31 Foster Children v. Bush*, 329 F.3d 1255, 1268 (11th Cir. 2003) (holding that language contained in the definitional

section of the Adoption Assistance and Child Welfare Act did not confer rights that foster children could enforce in a § 1983 action) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (rejecting the notion that case law permits "anything short of an unambiguously conferred right to support a cause of action brought under § 1983")). The Eleventh Circuit has explained: "We take from *Gonzaga* the lesson that we are to look at the text and structure of a statute in order to determine if it unambiguously provides enforceable rights. If the text and structure 'provide no indication that Congress intends to create new individual rights, there is no basis for a private suit.'" *31 Foster Children*, 329 F.3d at 1270. The Eleventh Circuit explained that a court must consider whether the statutory provisions in question: 1) contain "rights-creating" language that is individually focused; 2) address the needs of individual persons being satisfied instead of having a systemwide or aggregate focus; and 3) lack an enforcement mechanism through which an aggrieved individual can obtain review. *Id.*

Applying these factors to the DPPA, this Court concludes that the statutory language does not confer a private right of action under § 1983. This Court agrees with Defendants' argument that the DPPA has a system wide or aggregate focus when it addressed the question of remedies for the disclosure of records *pursuant to a state policy or practice*. (D.E. No. 69 at 9). This Court agrees with Defendants' point that "[r]ather than leaving enforcement of DPPA in [the context of disclosure of records pursuant to a state policy or practice] under 42 U.S.C. § 1983, Congress set out explicit remedies in the act." (D.E. No. 69 at 9) (citing 18 U.S.C. § 2724(a)). The DPPA defines "person" to exclude "a State or an agency thereof." 18 U.S.C. § 2725(2). As Defendants correctly note, the Act does not authorize a private right of action against a state or its agencies. Furthermore, only the U.S. Attorney General is authorized to seek relief for DPPA violations by "[a]ny State department of motor vehicles that

has a policy or practice of substantial noncompliance with this chapter," and such a state "shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance." *Id.* § 2723(b). This Court finds that the text and structure of relevant provisions of the DPPA provide no indication that Congress intended to create new individual rights for enforcement of the disclosure of records *pursuant to a state policy or practice* and that there is no basis for a private suit pursuant to § 1983. *See 31 Foster Children*, 329 F.3d at 1270.

This Court concludes that taking the alleged facts of the Complaint in the light most favorable to the Plaintiff, the alleged facts do not show that the Defendants' conduct violated a constitutional right or a statutory right for which they may sue pursuant to § 1983. *Saucier*, 533 U.S. at 201. Because this Court has determined that no constitutional right to privacy would have been violated if the allegations were established, "no further inquiries concerning qualified immunity" are required for Plaintiffs' § 1983 claim. *See id.* This Court finds that Plaintiffs have failed to sustain their burden of proof to demonstrate that qualified immunity is not appropriate for Count 1 of the Complaint, *Vinyard*, 311 F.3 at 1346, and it therefore finds that qualified immunity bars Count 1 of the Complaint.

E. Application of Qualified Immunity to Plaintiffs' Direct Statutory Claim under the Driver Privacy Protection Act

While issues regarding qualified immunity typically arise in the context of an alleged violation of a constitutional right pursuant to § 1983, several federal appellate cases have discussed the applicability of a qualified immunity defense to rights directly established by federal statutes. *See generally Tapley v. Collins*, 211 F.3d 1210 (11th Cir. 2000) (analyzing a qualified immunity defense for city officials in the context of the Federal Electronics Communications Privacy Act); *see*

also Gonzalez v. Lee County Hous. Auth., 161 F.3d 1290 (11th Cir. 1998) (analyzing a qualified immunity defense for a county housing authority supervisor in the context of the Fair Housing Act); *see also Cullinan v. Abramson*, 128 F.3d 301, 309 (6th Cir. 1997) (holding that city officials and outside counsel were entitled to qualified immunity against federal law claims under RICO). The Eleventh Circuit has noted that "the Supreme Court has placed few restrictions on the availability of the qualified immunity defense." *Tapley*, 211 F.3d at 1214 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (explaining that the qualified immunity defense protects "all but the plainly incompetent or those who knowingly violate the law")).

The Eleventh Circuit has acknowledged that Congress creates and controls statutory causes of action and has the power to abrogate defenses, including the common law defense of qualified immunity. *Tapley v. Collins*, 211 F.3d at 1214. Furthermore, the Eleventh Circuit has also explained that "the defense of qualified immunity is so well established, that if Congress wishes to abrogate it, Congress should specifically say so." *Id.* (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)).

In *Gonzalez v. Lee County Housing Authority*, the Eleventh Circuit analyzed whether Congress had abrogated the qualified immunity defense under the Fair Housing Act through its inclusion of an explicit good faith defense. The Eleventh Circuit found that "[n]either the text nor the legislative history of section 3617 [of the Fair Housing Act] indicates that Congress intended to abrogate the qualified immunity to which executive-branch officials were entitled under common law." *Gonzalez*, 161 F.3d at 1299. The Eleventh Circuit explained that its conclusion was consistent with decisions of the Eleventh Circuit and other courts holding that public officials are entitled to qualified immunity when sued under a

federal statute. *See id.* at 1300 n.34. The Eleventh Circuit cited eleven federal appellate decisions holding that qualified immunity is available as a defense to claims arising under eight different federal statutes. *Id.*[9] Similarly, in *Tapley v. Collins* the Eleventh Circuit determined that qualified immunity was a defense to the Federal Wiretap Act, notwithstanding the existence of a statutory "good faith" defense. *See Tapley*, 211 F.3d at 1214-17. The Eleventh Circuit in that case held that district court had erred in finding otherwise and remanded the case to the district court to "apply qualified immunity principles." *Id.* at 1217.

After a careful review of the text of the DPPA, this Court finds that there is no indication that Congress abrogated a qualified immunity defense. *See generally* 18 U.S.C. § 2721 *et seq.*; *Gonzalez*, 161 F.3d at 1299. Thus, this court now applies "qualified immunity principles" and the Eleventh Circuit's test for determining qualified immunity to the DPPA. This Court notes that such an analysis differs slightly from the application of qualified immunity to a violation of a constitutional or statutory right pursuant to § 1983. This Court finds that it must first determine whether the Plaintiffs' allegations, if true, establish a statutory violation. *See Vinyard*, 311 F.3d at 1346; *Gonzalez*, 161 F.3d at 1294-95; *Cullinan*, 128 F.3d at 304-05. If a statutory right would have been violated under the plaintiff's version of the facts, the next, sequential step is to ask whether the right was clearly established. *See id.*

---

[9] This Court recognizes the fact that the Eleventh Circuit made it clear in *Gonzalez v. Lee County Housing Authority* that its decision "should not be construed to address whether qualified immunity is available in actions brought under statutes other than [42 U.S.C.] § 3617." 161 F.3d 1290, 1294-95 (11th Cir. 1998). However, after careful analysis of relevant Supreme Court and Eleventh Circuit case law, this Court finds that the Eleventh Circuit's rationale for applying qualified immunity principles to federal statutes in *Gonzalez v. Lee County Housing Authority* and *Lee v. Tapley* is applicable to the instant case.

1. The Plain Language of the Driver Privacy Protection Act Establishes A Cause of Action Against All Persons

This Court must first determine whether 18 U.S.C. § 2724 establishes a statutory cause of action against state officials in their individual capacities. Defendants generally argue that the "DPPA does not give the [P]laintiffs a private cause of action to challenge the release of driver records *pursuant to a policy mandated by state law*." (D.E. No. 69 at 8) (emphasis in original). This Court has already discussed this argument in the context in which it most logically fits: analyzing the availability of a private cause of action under the DPPA pursuant to § 1983. However, it should be noted that Defendants, although their filings make it clear that they seek qualified immunity for both Count I and Count II of the Complaint, never specifically address the issue of whether Plaintiffs are capable of enforcing alleged violations of the DPPA *directly* under 18 U.S.C. § 2724, the civil action provision of the DPPA, as opposed to attempting to enforce the DPPA *through § 1983*. Defendants' argument that "the DPPA does not create a private right of action to challenge the release of records arising from department policy or state law" relies on *Gonzaga University v. Doe* and *31 Foster Children v. Doe*. *See* (D.E. No. 69 at 8-10). As was discussed *supra*, these cases examine whether federal statutes create private rights that can be enforced pursuant to § 1983, as opposed to causes of action established directly in the statutes themselves.

This Court now considers the plain language of relevant portions of the DPPA. Section 2724, entitled "Civil action," states: "A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court." *Id.* As was noted previously, the DPPA defines a "person" as "an indi-

vidual, organization or entity, but does not include a State or agency thereof." *Id.* § 2725(2). The term "agency" is not defined in the statute.[10] This Court concludes that, under the plain language of the 18 U.S.C. § 2724, "any person," including a state executive official, may be liable if he or she "knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter." This Court finds that the Plaintiffs' allegations, if true, establish a statutory violation. *See Vinyard*, 311 F.3d at 1346; *Gonzalez*, 161 F.3d at 1294-95; *Cullinan*, 128 F.3d at 304-05.

2. *The Contours of the Statutory Right were Not Established with Sufficient Clarity to Provide Defendants with Fair Notice that their Individual Conduct Under the Circumstances Violated a Statutory Right*

However, this Court's qualified immunity inquiry does not end with the finding that Plaintiffs' allegations, if true, establish a statutory violation. This Court must "apply qualified immunity principles" to determine whether the "state of the law" at the time of the alleged conduct giving rise to the suit gave the official in question "fair warning" that his or her conduct was in violation of a statutory right. *See Tapley*, 211 F.3d at 1217; *Hope*, 536 U.S. at 740. After carefully considering the factual context of this case, as well as the relatively intricate body of case law regarding the level of legal clarity necessary for determining the "objective reasonableness of [Defendants'] conduct as measured by reference to clearly established law,'" *Harlow*, 457 U.S. at 818, this Court concludes the state of the law was not sufficiently clear to provide Defendants with "fair warning" that their conduct violated a statutory right under the novel circumstances of this case.

---

[10] Blacks law dictionary, in relevant part, defines "agency" as "[a] governmental body with the authority to implement and administer particular legislation." *Black's Law Dictionary*, 63 (7th ed. 1999).

First, this Court notes that Plaintiffs' arguments as to why Defendants are not entitled qualified immunity rely on the premise that *Reno v. Condon* and the DPPA's plain language "clearly established" the relevant areas of the law. (D.E. No. 70 at 13). Indeed, much of the "facts" section of Plaintiffs' Complaint is devoted to delineating the "statements of facts and law" that *Reno v. Condon* purportedly establishes. This Court does not accept Plaintiffs' characterizations of *Reno v. Condon* at face value, and it is not required to accept as true allegations in Plaintiffs' Complaint that describe the Supreme Court's holding in that case. *See generally, Elder v. Holloway*, 510 U.S. 510, 516 (1994) (noting in the qualified immunity context that "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'").

Second, this Court notes that Plaintiffs' Complaint appears to attempt to establish, or at least imply, some level of *subjective* bad faith on the part of Defendants. For example, with regard to Defendant Dickinson, Plaintiffs' Complaint emphasizes the fact that Dickinson "worked directly" with Sherry Slepin "[i]n her capacity as Legislative Affairs Administrator," that he had numerous discussions with her "concerning the financial impact of the Shelby Amendment on the DHSMV." (D.E. No. 65 at ¶¶ 12(A)(xiv-xv)). The Complaint then notes:

> In November, 2002, Sherry Slepin resigned from her position with DHSMV to become a private lobbyist. Among her clients were Auto Data Direct and R.L. Polk & Company, both of which have been long time bulk purchasers of personal information form DHSMV. After leaving DHSMV, Sherry Slepin continued a personal relationship with Defendant, [Dickinson], and eventually married him on May 19, 2003.

Id. at ¶ 12(A)(xvii). Such allegations are not relevant to the inquiry at hand. The Supreme Court has noted that *Harlow v. Fitzgerald* "rejected the inquiry into state of mind in favor of a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191 (1984). Furthermore, the Supreme Court has noted that an allegation of subjective good faith cannot suffice to defeat qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (noting that an allegation of malice will not defeat an official's claim to qualified immunity); *see also Cullinan*, 128 F.3d at 309. Thus, Plaintiffs' allegations that Defendants were in fact aware of *Reno v. Condon* and Congressional amendments to the DPPA, *see* (D.E. No. 65 at 12-14), are of no moment.

As was discussed in Section III(B) of this Order, *supra*, there has been considerable Supreme Court case law devoted to discussing the appropriate level of clarity of "the state of the law" that is necessary for evaluating the "objective reasonableness" of an official's actions. As the Supreme Court noted in *Anderson v. Creighton*, the operation of the objective reasonableness standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639. This Court finds it useful to reiterate three points that the Supreme Court has emphasized. First, the Supreme Court has explained:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640. Second, Supreme Court case law indicates that the a court's task of evaluating "the contours" of the law does not exist in an abstract factual vacuum, but, rather, in the context of factual circumstances that have been

alleged. For example, in *Hope v. Pelzer* the Supreme Court held that there is sufficient legal clarity that a reasonable official would have "fair warning" that chaining prisoners to a "hitching post" for extended periods of time was unconstitutional due to the "obvious cruelty inherent" in the facts of the case. *See Hope*, 536 U.S at 732. Third, the Supreme Court has recognized that there is a practical need for executive level government officials to "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis*, 468 U.S. at 196. Such officials "are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory," and, by virtue of their executive role, such officials "should not err always on the side of caution." *Id.*

This Court concludes that, under the factual circumstances alleged in the Complaint, as well as the judicial landscape in which the Defendants' alleged conduct occurred, a reasonable official would not have had "fair warning" that his or her conduct would violate a statutory right under the DPPA. Nor would a reasonable official have "fair warning" that, under the "state of the law" at the time, such conduct could expose himself or herself to personal civil liability. Taking the allegations in the Complaint as true, as this Court must, the allegations indicate that the three Defendants were faced with a difficult executive-level policy decision, indeed they were stuck between a proverbial "rock and a hard place." On the one hand, there was an amendment to the DPPA that arguably mandates an "opt in requirement," *see Condon*, 528 U.S. at 669 (discussing Public Law 106-69), as well as language indicating that the Attorney General was authorized, if not required, to pursue civil damages against "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance with [the DPPA]." 18 U.S.C. § 2723(b). On the other hand, the Florida Constitution contains language regarding public records that describes itself as

"self-executing," and presumes records to be public records that must be disclosed absent an express constitutional or legislative exemption that precludes disclosure. *See* Fla. Const. Art. I, § 24.[11] Furthermore, at the time of Defendants' conduct, a Florida statutory provision governed the release of

---

[11] The Florida Constitution states in relevant part:

> § 24. Access to public records and meetings
>
> (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.
>
> * * *
>
> (c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Fla. Const. Art. I, § 24.

records by the DHSMV. *See* Fla. Stat. § 119.07(aa) (2003); *Kehoe*, 421 at 1210-13.[12]

This Court notes that there are no Supreme Court or Eleventh Circuit cases, or any other federal cases for that matter, that discuss the application of the DPPA under any set of factual circumstances even remotely similar those of the instant case. Furthermore, without commenting on the merits of Defendants' constitutional law argument, this Court disagrees with Plaintiffs' broad statement that Defendants' constitutional arguments have been "squarely rejected by the Supreme Court." (D.E. No. 70 at 15-16).[13] Plaintiffs argue that their statutory right is "'clearly established' by a federal statute of 'obvious clarity.'" (D.E. No. 70 at 13). However, this Court again notes that Act contains no clear abrogation of qualified immunity. *See Tapley*, 211 F.3d at 1214; *Buckley*, 509 U.S. at 268.

---

[12] Florida Statute § 119.07(aa) (2003) stated in relevant part:

> Personal information contained in motor vehicle records exempted by an individual's request pursuant to this paragraph shall be released by the [DHSMV] for any of the following uses:
>
> * * *
>
> 12. For bulk distribution for surveys, marketing, or solicitations when the department has implemented methods and procedures to ensure that:
>
> a. Individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and
>
> b. The information will be used, rented, or sold solely for bulk distribution for survey, marketing, and solicitations will not be directed at those individuals who have timely requested that they not be directed at them.

Id.

[13] For example, Plaintiffs concede that *Reno v. Condon* was "decided six months before the effective date of the Shelby Amendment." (D.E. No. 70 at 11). Arguably, a constitutional challenge to the text of that amendment was not before the Supreme Court in *Reno v. Condon*.

This Court finds that the contours of the statutory rights in question are not sufficiently clear that a reasonable public official under the circumstances could have had "fair warning" that their actions, in their individual capacities, were violating a statutory right. Nor could a reasonable public official have had fair warning that, under the "state of the law" he or she could possibly be exposing himself or herself to personal civil liability. This finding does not provide any comment on the merits of the actions that were taken by the Defendants or the decisions that they reached through their exercise of their inherent discretionary authority. However, this Court notes, as did the Supreme Court, that "officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer*, 416 U.S. at 246. A long tradition of Supreme Court case law establishes that qualified immunity shields public officials from personal civil liability under the circumstances of the instant case. Thus, in conclusion, Plaintiffs have failed to sustain their burden of proof to demonstrate that qualified immunity is not appropriate for Count II of the Complaint. *Vinyard*, 311 F.3d at 1346. This Court finds that qualified immunity bars Count II of the Complaint.

For these reasons, it is hereby:

ORDERED AND ADJUDGED that

1. Defendants' Motion to Dismiss the Second Amended Complaint (D.E. No. 69) is *GRANTED in part*, consistent with the findings described in this Order.

2. The Second Amended Complaint is *DISMISSED with prejudice*.

3. This case is *CLOSED*, all pending motions are *DENIED as moot*.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of March, 2006.

/s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Bandstra
All Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed JAN 3, 2005]

04-21351-CIV-GRAHAM/GARBER

MARY ANN COLLIER, ARTHUR L. WALLACE,
ROY MCGOLDRICK, and ROBERT PINO,
Plaintiffs,

v.

FRED O. DICKINSON III, CARL A. FORD, SANDRA LAMBERT,
MICHAEL D. MCCASKILL, BOYD WALDEN, PHILLIP SHELTON,
DAVID M. PERRYMAN, and LAWRENCE J. BILBO,
Defendants.

ORDER

THIS CAUSE came before the Court upon Defendants' Motion to Dismiss (D.E. 16).

THE COURT has reviewed the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

I. INTRODUCTION

This action arises from the Florida Department of Highway Safety and Motor Vehicles' (the "DHSMV") compilation and sale of personal information, related to motor vehicle records, to various third parties for bulk distribution for surveys, marketing or solicitations. Plaintiffs Mary Ann Collier ("Collier"), Arthur L. Wallace ("Wallace"), Roy McGoldrick ("McGoldrick"), and Robert Pino ("Pino"), individually and on behalf of others similarly situated (the "Class Members"),

have sued defendants, who are officials of the DHSMV, for monetary damages for violations of the constitutional right to privacy, pursuant to 42 U.S.C. § 1983, and the Drivers' Privacy Protection Act, 18 U.S.C. § 2724 (the "DPPA").

The DPPA makes it unlawful, in some circumstances, for a person to knowingly obtain, disclose, or use "personal information" from a motor vehicle record without the express consent of the person to whom the information pertains. See Pub. L. 106-69, 113 Stat. 986 §§ 350(c), (d), (e); 18 U.S.C. §§ 2721, 2724. In 2000, the Supreme Court acknowledged this command: "Under the amended DPPA, States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Reno v. Condon*, 528 U.S. 141, 144-45 (2000).

On July 15, 2004, Defendants filed a Motion to Dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b), asserting: (1) the Court should abstain under *Younger v. Harris*, 91 S.Ct. 746 (1971), because three of the four plaintiffs in the present case previously filed an action in state court based on the same facts; (2) the Eleventh Amendment bars this action because the state is the real party in interest; (3) Plaintiffs have failed to state a cause of action under the DPPA; (4) Plaintiffs have no constitutionally protected privacy rights in the information collected by the DHSMV; and (5) Defendants are entitled to qualified immunity from damages.

II. BACKGROUND

Plaintiffs Collier, McGoldrick, and Pino have filed two actions challenging the DHSMV's policies governing the disclosure of motor vehicle registration. The first, filed in Florida state court on May 28, 2004, asserts claims exclu-

sively under Florida law and seeks recovery for inverse condemnation. Plaintiffs Collier, McGoldrick, and Pino, along with Wallace, filed this action in the district court on June 7, 2004. On July 6, 2004, Plaintiffs filed an Amended Complaint in the federal action seeking monetary relief for violations of the United States Constitution, pursuant to 42 U.S.C. § 1983, and for violations of the DPPA. The same facts underlie the state and federal actions.

According to the Amended Complaint, Plaintiffs have owned one or more vehicles registered with the DHSMV and have held Florida driver licenses issued by the DHSMV. To register their vehicles and obtain driver licenses, Plaintiffs were required to, and did, provide the DHSMV with certain personal information. The DHSMV entered this personal information into a computer database of motor vehicle records maintained and administered by the DHSMV which contains personal information of all licensed drivers and registered motor vehicle owners in the State of Florida.

Plaintiffs allege that during the period commencing June 1, 2000, and continuing to the present, Defendants, in their personal capacity as employees of the DHSMV, knowingly, repeatedly, and without Plaintiffs' consent, took Plaintiffs' "personal information" maintained by the DHSMV, compiled and reformatted it into customized mailing lists, and sold these lists to various third parties for bulk distribution for surveys, marketing, solicitations, or other purposes not permitted by the DPPA. The personal information at issue is identified in the Amended Complaint as "personal information," as defined by Fla. Stat. § 119.07(3)(aa) and by the DPPA, 18 U.S.C. § 2725. The Amended Complaint alleges that Defendants' sale of Plaintiffs' personal information has resulted in the State of Florida receiving over twenty-seven million dollars ($27,000,000.00) per year since June 1, 2000.

III. STANDARD OF REVIEW

A complaint should not be dismissed "for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957); *Bracewell v. Nicholson Air Services, Inc.*, 680 F.2d 103, 104 (11th Cir. 1982). In deciding a motion to dismiss, a court can only examine the four corners of the complaint. *See Crowell v. Morgan Stanley Dean Witter Services, Co., Inc.*, 87 F.Supp.2d 1287 (S.D.Fla. 2000). Additionally, a court must accept a plaintiff's well pled facts as true and construe the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The threshold of sufficiency that a complaint must meet is exceedingly low. *Ancata v. Prison Health Servs. Inc.*, 769 F.2d 700, 703 (11th Cir. 1985); *Geidel v. City of Bradenton Beach*, 56 F.Supp.2d 1359, 1362 (M.D. Fla. 1999); *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994); *Scheuer*, 416 U.S. at 236.

IV. ANALYSIS

A. Abstention Under Younger v. Harris

Defendants argue that the Court should abstain pursuant to "the *Younger* doctrine" because of the pending state civil action, where some of the Plaintiffs raised exclusively state law claims arising from the same facts at issue in the present federal action. The Court concludes that abstention is not warranted in the present case.

The *Younger* doctrine "reflect[s] the longstanding national public policy, based on principles of federalism, of allowing state courts to try cases—already pending in state court—free from federal court interference." *Butler v. Alabama Judicial Inquiry Commission*, 245 F.3d 1257, 1261 (11th Cir. 2001). However, the abstention doctrine remains "the exception, not the rule" to the federal courts' "virtually unflagging" duty "to adjudicate claims within their jurisdiction." *New Orleans*

Pub. Serv. Inc. v. Council of the City of New Orleans, 109 S. Ct. 2506, 2513 (1989) ("*NOPSI*").

"The *Younger* doctrine does not require abstention merely because a federal plaintiff, alleging a constitutional violation in federal court, filed a claim under state law, in state court, on the same underlying facts." *Wexler v. Lepore*, 385 F.3d 1336, 1340 (11th Cir. 2004). The abstention doctrine is not triggered unless the federal court decision would create an "undue interference" with the state proceeding. *Id.* at 1339; *NOPSI*, 109 S.Ct. at 2513 (citing *Younger*, 1919 S.Ct. at 751). In addition, the state proceeding at issue must involve "certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions . . . it has never been suggested that *Younger* requires abstention in deference to a state proceeding reviewing legislative or executive action." *NOPSI*, 109 S.Ct. at 2518. The existence of a parallel state court action does not warrant abstention in federal court "unless the requested federal relief would result in meticulous and burdensome federal oversight of state court or court-like functions." *Wexler*, 385 F.3d at 1340 (citing *Rizzo v. Goode*, 96 S.Ct. 598, 608-09 (1976)).

With these precedents in mind, the Court turns to the present case. Defendants argue that the Court should abstain in the present action because a decision may render moot the state court action. In support of this argument, Defendants cite *Wexler v. Lepore*, 319 F.Supp.2d 1354 (S.D. Fla. 2004). That decision has been overturned by the Eleventh Circuit. *See Wexler*, 385 F.3d 1336.

In *Wexler*, plaintiff Wexler filed two action [sic] challenging the recount system in various Florida counties. The first, filed in a Florida state court, asserted claims exclusively under Florida law. Plaintiff Wexler, together with several additional plaintiffs, subsequently filed an action in federal court, pursuant to 42 U.S.C. § 1983, alleging violations of the United States Constitution. The same facts underlined both

actions. The district court determined that *Younger* abstention was proper because the relief sought by the plaintiffs would directly interfere with the state proceeding by potentially rendering moot the state proceeding. On appeal, the Eleventh Circuit determined that this constituted an error of law and reversed the district court. The Eleventh Circuit held that without showing an "undue interference" on state proceedings, abstention is not permitted. *Wexler*, 385 F.3d at 1339 (citing *NOPSI*, 109 S.Ct. at 2513).

The Eleventh Circuit reasoned that "a decision in the instant federal case might, as a practical matter, lead to a state proceeding's coming to an end, but on entirely different grounds than those raised—or could have been raised as a defense—in the state action when it was filed." *Id.* Similarly, a decision in the present federal action, where Plaintiffs assert only federal claims, might lead to the state action's termination, but on entirely different grounds than those raised as a defense in the state action, where plaintiffs have asserted a state law claim for taking/inverse condemnation.

The Court finds that the parallel proceedings brought by Plaintiffs Collier, McGoldrick and Pino do not present the "undue interference" in state court proceedings necessary to abstain pursuant to the *Younger* doctrine. Nor would the monetary damages sought in this case usurp the state court's ability to "perform their judicial functions." *NOPSI*, 109 S.Ct. at 1526. Accordingly, the *Younger* doctrine is inapplicable and the Court will not abstain.

B. The Framework for Evaluating a Qualified Immunity Defense

"While qualified immunity is typically addressed at the summary judgment stage of the case, the defense may be raised and considered on a motion to dismiss; the motion will be granted if the 'complaint fails to allege the violation of a clearly established constitutional right.'" *Chesser v. Sparks*,

248 F.3d 1117, 1121 (11th Cir. 2001) (quoting *Williams v. Ala. State Univ.*, 102 F.3d 1179, 1182 (11th Cir. 1997)).

Qualified immunity insulates public officials from individual liability for actions taken within the scope of their discretionary authority, so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "The purpose of the immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit 'all but the plainly incompetent or one who is knowingly violating the federal law.'" *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (quoting *Willingham v. Loughnan*, 261 F.3d 1178, 1187 (11th Cir. 2001)). "That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities." *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

To receive qualified immunity, the public official "must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Lee*, 284 F.3d at 1194 (citation and internal quotation marks omitted). If the defendant is not acting within his or her discretionary authority, he or she is ineligible for the benefit of qualified immunity. "A government official acts within his or her discretionary authority if objective circumstances compel the conclusion that challenged actions occurred in the performance of the official's duties and within the scope of his authority." *Hill v. DeKalb Reg'l Youth Detention Ctr.*, 40 F.3d 1176, 1185 n. 17 (11th Cir. 1994). Here, the Amended Complaint includes allegations that Defendants were acting "under color of law" in engaging in

the allegedly wrongful conduct. Defendants argue that they "acted to carry out the state's constitutional and statutory open public records policies embodied in § 24, Art. I., Fla.Const., and § 119.07(aa), Fla. Stat." (D.E. 16 at p.17).

Once Defendants have established that they were acting within their discretionary authority, the burden shifts to Plaintiffs to show that qualified immunity is not appropriate. *See Jackson v. Sauls*, 206 F.3d 1156, 1164 (11th Cir. 2000). To overcome the defense of qualified immunity, Plaintiffs must satisfy the Supreme Court's two-part test for evaluating a claim of qualified immunity. As a threshold matter, the Court must decide whether the facts alleged, assuming they are true, establish a statutory or constitutional violation. *See Saucier v. Katz*, 533 U.S. 194 (2001). If this is answered in the affirmative, the Court proceeds to the second query, which is to determine whether the right violated was clearly established. *Id.* at 201.

"For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Gonzalez v. Lee County Housing Authority*, 161 F.3d 1290, 1295 (11th Cir. 1998) (citing *Lassiter*, 28 F.3d at 1149) (internal citations omitted). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Id.* (quoting *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 (11th Cir. 1997) (internal citations omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-

existing law, the unlawfulness must be apparent." *Hope v. Pelzer*, 122 S.Ct. 2508, 2515 (citations omitted). Thus, the Court explains that in order to overcome Defendants' qualified immunity defense, Plaintiffs must show that existing law at the time of the conduct in question provided Defendants with "fair warning" that their conduct violated clearly established law. *See id.* at 2515-16.

Ordinarily, a plaintiff who seeks to overcome a state official's affirmative defense of qualified immunity must cite case law, in force at the time of the defendant's actions, that would have made it absolutely clear that the defendant's conduct violated federal law. However, the Eleventh Circuit has "acknowledged the possibility that some federal statutory provisions will be sufficiently clear on their own to provide defendants with fair notice of their obligations under the law." *See Gonzalez*, 161 F.3d 1290.

With these precedents in mind, the Court looks to whether Defendants have qualified immunity for Plaintiffs' cause of action under the DPPA. Plaintiffs claim that Defendants violated the DPPA in their individual capacities. The DPPA creates a private cause of action against individual defendants who knowingly obtain, disclose or use certain personal information associated with driver licenses without the consent of the individual to whom the information pertains. 18 U.S.C.A. §§ 2721, 2724(a).

In the present case, it is unclear whether a reasonable person in each defendant's position would have known of the rights established by the DPPA, and whether each defendant could be expected to know that certain conduct would violate those statutory rights. *See Vinyard*, 311 F.3d at 1350. It is unclear whether Defendants had fair warning of the duties and obligations of the DPPA. Given the state of the law at the time of the alleged wrongful conduct, it is unclear whether Defendants are entitled to qualified immunity for the DPPA claim. For example, Florida law conflicted with the DPPA at

the time of the alleged wrongful conduct. *Compare, e.g.*, 18 U.S.C.A. § 2721, to § 119.07(aa), Fla.Stat. (2000). In addition, Defendants assert that they "had no discretion under state law to refuse to release public records when requested." (D.E. 16 at p.17) (citing Sections 119.02 and 119.10, Fla.Stat).

The Amended Complaint includes allegations that one of the defendants, Fred O. Dickinson III, held a staff meeting in February 2000, during which time it was noted and confirmed that it would be unlawful to disclose personal information from motor vehicle records for purposes of bulk distribution for surveys, marketing or solicitations, without the express consent of the person to whom the information pertains. However, the Amended Complaint does not indicate which of the remaining defendants, if any, were present at that meeting, or include allegations as to each defendant's knowledge.

Accordingly, the Court will permit discovery on the limited issue of whether Defendants are entitled to a qualified immunity defense to Plaintiff's claim under the DPPA.

CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that the parties shall have ninety (90) days from the date of this Order to conduct discovery on the limited issue of whether Defendants are entitled to a qualified immunity defense to Plaintiffs' claim under the Drivers' Privacy Protection Act, 18 U.S.C. § 2724. In addition, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is DENIED without prejudice to file a response to the Amended Complaint within ten (10) days of the completion of limited discovery as to the qualified immunity

defense. Plaintiffs shall then file a reply in accordance with Local Rule 7.1.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of December, 2004.

/s/ Donald G. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed MAY 4, 2007]

No. 06-12614-BB

MARY ANN COLLIER, ARTHUR L. WALLACE,
ROY MCGOLDRICK, ROBERT PINO,
Plaintiffs-Appellants,

versus

FRED O. DICKINSON, III, CARL A. FORD, SANDRA LAMBERT,
MICHAEL D. MCCASKILL, BOYD WALDEN, PHILLIP SHELTON,
DAVIS M. PERRYMAN, LAWRENCE J. BILBO,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BLACK, BARKETT and KRAVITCH, *Circuit Judges*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosey Barkett
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

APPENDIX E

18 U.S.C. § 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

> **(1)** personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or
>
> **(2)** highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): *Provided*, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible uses.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-

331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is

related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on conditions.—No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

18 U.S.C. § 2722. Additional unlawful acts

(a) Procurement for unlawful purpose.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

18 U.S.C. § 2723. Penalties

(a) Criminal fine.—A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State department of motor vehicles.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

18 U.S.C. § 2724. Civil action

(a) Cause of action.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.[1]

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.

---

[1] So in original. The period probably should be replaced with a semicolon.

FILED
- 5 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-197

IN THE

Supreme Court of the United States

FRED O. DICKINSON, II, *et al.*,
Petitioners,

v.

MARY ANN COLLIER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE IMAGITAS, INC. IN SUPPORT OF PETITIONERS

JOEL A. MINTZER
B. TODD JONES
HEATHER M. MCELROY
ROBINS, KAPLAN, MILLER & CIRESI LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500

RANDOLPH D. MOSS
Counsel of Record
ERIC R. COLUMBUS
DANIEL A. ZIBEL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 663-6000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

REASONS FOR GRANTING THE PETITION 2

I. THE SPECTER OF MASSIVE DAMAGES ON STATE OFFICIALS UNDER THE DPPA IMPERILS VALUABLE STATE PROGRAMS 3

A. Public-Private Partnerships In Sending Registration Mailings To Drivers Provide Significant Benefits To States And Motorists Alike 3

B. DPPA Lawsuits Such As *Collier* Threaten The Viability Of These Public-Private Partnerships 5

II. NOTHING IN THE DPPA SUGGESTS THAT CONGRESS CONTEMPLATED SUCH AN OUTCOME, WHICH WOULD RAISE SERIOUS ELEVENTH AMENDMENT CONCERNS 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Bender v. *Williamsport Area School District*, 475 U.S. 534 (1986) 10
Brandon v. *Holt*, 469 U.S. 464 (1985) 10
Commissioner v. *Standard Life & Accident Insurance Co.*, 433 U.S. 148 (1977) 7
Cornforth v. *University of Oklahoma Board of Regents*, 263 F.3d 1129 (10th Cir. 2001) 12
Fidelity Federal Bank & Trust v. *Kehoe*, 547 U.S. 1051 (2006) 7
Kentucky v. *Graham*, 473 U.S. 159 (1985) 11
Lizzi v. *Alexander*, 255 F.3d 128 (4th Cir. 2001), *overruled in part on other grounds by Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003) 12
Luder v. *Endicott*, 253 F.3d 1020 (7th Cir. 2001) 12
Pennhurst State School & Hospital v. *Halderman*, 465 U.S. 89 (1984) 11
Territory of Alaska v. *American Can Co.*, 358 U.S. 224 (1959) 7
United States v. *Mitchell*, 463 U.S. 206 (1983) 7

STATUTES

18 U.S.C.
§ 2721 6
§ 2723 9
§ 2724 ..... 7, 9
§ 2725 ..... 7, 9

Ky. Rev. Stat. Ann. § 186.040(4) 7

Mass. Gen. L. ch. 90 § 2E 7

N.Y. Veh. & Traf. Law § 404-c 7

Ohio Rev. Code Ann. § 4503.104 7

Wash. Rev. Code § 46.16.076 7

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Ad deal saves BMV $1.5M in first year, Business First, Sept. 20, 2006, *available at* http://columbus.bizjournals.com/columbus/stories/2006/09/18/daily17.html 5

DriverSource Program Fact Sheet, *available at* http://www.imagitas.com/images/imagitas/documents/Imagitas%20Program%20Materials2.pdf 5

Guinane, Patrick, *State selling ads to offset cost of BMV renewal letters*, The Times, Apr. 15, 2006, *available at* http://www.nwitimes.com/articles/2006/04/15/news/lake_county/454d052701eac09b86257150007f31a1.txt 4

PennDOT & DCED Team Up to Promote Governor Rendell's Tourism Initiative (Feb. 2005), *available at* http://www.state.pa.us/papower/cwp/view.asp?A=11&Q=440835 7

State to include ads in vehicle registration notices, Hannibal Courier-Post, June 28, 2006, *available at* http://www.hannibal.net/stories/062906/news_20060629034.shtml 5

IN THE

Supreme Court of the United States

No. 07-197

FRED O. DICKINSON, III, *et al.*,

Petitioners,

v.

MARY ANN COLLIER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE IMAGITAS, INC. IN SUPPORT OF PETITIONERS

Imagitas, Inc. respectfully submits this brief in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS

Imagitas, Inc. is a private contractor retained by Florida, Massachusetts, Minnesota, Missouri, New York, and Ohio to design and distribute motor vehicle registration notices to owners of vehicles registered within each state. The cost of distributing registration materials is defrayed by in-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than Imagitas, Inc. and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the clerk.

cluding state-approved advertising inserts in the mailings. On behalf of the states, Imagitas prepares the registration renewal notices, develops and inserts private advertisements, and mails the packets to motorists.

This program, known as DriverSource, has helped cash-strapped states alleviate the operational and financial burdens associated with producing and mailing vehicle registration renewal notices. As a contractor that provides these state services, Imagitas will be affected by the court of appeals' decision to the extent it unnecessarily dissuades state governments from using private contractors to assist in the registration renewal process. If state officials face even a remote risk of catastrophic personal liability for obtaining the benefits of these programs, they may well forgo programs like DriverSource—even if convinced that the programs are entirely consistent with state and federal law.

Imagitas is also a defendant in numerous lawsuits alleging that the DriverSource program violates the Drivers' Privacy Protection Act (DPPA). In addition, lawsuits related to DriverSource have been filed against state officials, nominally in their "personal capacities," and thus exert a substantial chill on DriverSource and similar programs. Indeed, one state has already refrained from signing a contract with Imagitas pending resolution of DPPA litigation.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is not only mistaken but carries broad ramifications that will likely affect the ability of the states to administer cost-efficient vehicle registration renewal programs like DriverSource. Although the facts of this case differ markedly from the DriverSource program, the impact of the court of appeals' interpretation of the DPPA will inevitably extend well beyond the present litigation. By allowing "personal capacity" suits seeking massive damages against state officials who merely administer a state program, the decision—if allowed to stand—will exert a chilling effect on all state activity that poses even the remotest risk of liability under the DPPA.

The courts of appeals' construction of the DPPA is at odds with both the structure of the Act and common sense. The Act specifically limits remedies for a state's violation of the DPPA to civil suits brought by the Attorney General of the United States, with liability capped at $5,000 per day. Yet the court of appeals' interpretation would allow private plaintiffs to evade this limitation by prosecuting putative class-action lawsuits against state officials for their official acts, seeking statutory damages of $2,500 for each member of a class that, if certified, could number in the millions. It is implausible—to put it mildly—that Congress intended to cap the liability of state departments of motor vehicles at $5,000 per day, while permitting claims for *billions* of dollars against the officials who work there for doing nothing more than implementing state policy.

Imagitas is engaged in activities that benefit taxpayers and that do not violate the DPPA. Yet the threat of massive personal liability—and the *in terrorem* effect of the court of appeals' decision—will inescapably cause state officials to reassess their participation in these programs and to look askance at new initiatives. The Court should not allow this mistaken interpretation of the DPPA to stand where the decision undermines valuable, and entirely lawful, state programs throughout the country.

I. THE SPECTER OF MASSIVE DAMAGES ON STATE OFFICIALS UNDER THE DPPA IMPERILS VALUABLE STATE PROGRAMS

A. Public-Private Partnerships In Sending Registration Mailings To Drivers Provide Significant Benefits To States And Motorists Alike

In order to promote public safety, all states have laws governing the registration and licensing of motor vehicles. Given the ubiquity of motor vehicles and the dangers that they can pose, this is an important—and expensive—state activity.

To carry out this responsibility as efficiently as possible, nearly all states send mailings to registered drivers reminding them to renew their vehicle registrations. And to save scarce dollars, certain states hire third-party contractors to

send out their vehicle registration or driver's license renewal forms. In some states, the private contractor designs, develops, and produces motor vehicle registration renewal notices, informational brochures, and remittance envelopes. The contractor then mails the registration renewal notice along with other informational material required by the state, plus—to defray the cost of the program—advertising inserts.

Florida, Massachusetts, Minnesota, Missouri, New York, and Ohio, for instance, have contracted with Imagitas to produce and to send out the vehicle registration renewal envelopes on behalf of the state and to include advertisements in those official mailings.[2] Indiana contracts with another vendor, Allison Payment Systems, to insert advertisements for local businesses in their registration renewal envelopes. *See* Patrick Guinane, *State selling ads to offset cost of BMV renewal letters*, The Times, Apr. 15, 2006, *available at* http://www.nwitimes.com/articles/2006/04/15/news/lake_county/454d052701eac09b86257150007f31a1.txt. In addition, at least five other states—Connecticut, Pennsylvania, Texas, Virginia, and Wisconsin—have issued requests for proposals for private vendors to administer similar programs. *See* Connecticut RFP No. RFP023-A-15-0560-C (Jan. 24, 2003); Pennsylvania RFP No. 353R09 (Apr. 14, 2004); Texas RFP No. B442006011856000 (Feb. 23, 2007); Virginia RFP No. 154:5-073 (June 3, 2005); Wisconsin RFP No. 261774 (Dec. 26, 2006).

Such public-private partnerships serve an important purpose. Faced with budget shortfalls and public resistance to tax increases, states must seek inventive ways to deliver excellent services to the public while controlling costs. States that contract with a third party to provide a govern-

---

[2] Certain Florida counties have also contracted with at least one other vendor. *See* Declaration of Andrea Kloehn Naef in Support of Def.'s Mot. for Leave to Correct Def.'s Mem. in Supp. of Mot. for S.J. and to Correct Exhibit, *Rine* v. *Imagitas, Inc.*, 3:06-cv-690-J-32HTS (M.D. Fla. Nov. 5, 2007), Ex. Z (Deposition of Patricia Ryan), 54:3-58:24.

ment service and to defray costs with advertising revenue advance these twin goals.

Since 2005, for instance, the Ohio Bureau of Motor Vehicles has saved $1.5 million through its partnership with Imagitas. *See Ad deal saves BMV $1.5M in first year*, Business First, Sept. 20, 2006, *available at* http://Columbus.bizjournals.com/columbus/stories/2006/09/18/daily17.html. Before contracting with Imagitas, the State of Missouri spent $1.1 million each year to print and mail registration renewal notices. *See State to include ads in vehicle registration notices*, Hannibal Courier-Post, June 29, 2006, *available at* http://www.hannibal.net/stories/062906/news_20060629034.shtml. Now, Missouri saves $530,000 each year and is also entitled to a share of the advertising revenue. *See id.* In total, the states that have contracted with Imagitas have saved over $12 million in printing expenses through January 2007 and have received over $4 million in additional revenue. *See* DriverSource Program Fact Sheet, *available at* http://www.imagitas.com/images/imagitas/documents/Imagitas%20Program%20Materials2.pdf. The court of appeals' mistaken interpretation of the DPPA, however, threatens to undo those savings.

B. DPPA Lawsuits Such As *Collier* Threaten The Viability Of These Public-Private Partnerships

These programs have provoked numerous lawsuits alleging that the disclosure of motor vehicle registration information to state contractors and the use of that information for marketing purposes without express consent from each motorist violates the DPPA.[3] Several of these suits,

---

[3] *See Rine* v. *Imagitas, Inc.*, No. 3:06-cv-690-J-32HTS (M.D. Fla.); *Rine* v. *Dickinson*, No. 3:07-cv-156-VMC-HTS (M.D. Fla); *Gentile* v. *Imagitas, Inc.*, No. 3:07-cv-525-TJC-HTS (S.D. Fla.); *Kendron* v. *Imagitas, Inc.*, No. 1:06-cv-11893-NMG (D. Mass.); *Mathias* v. *Imagitas, Inc.*, No. 1:06-cv-12061-NMG (D. Mass.); *Kracum* v. *Imagitas, Inc.*, No. 06-cv-3817-JRT-FLN (D. Minn); *Landree* v. *Imagitas, Inc.*, No. 06-cv-3995-JRT-FLN (D. Minn); *Kracum* v. *McCormack*, No. 07-cv-1462-JMR-FLN (D. Minn.); *Ressler* v. *Imagitas, Inc.*, No. 06-cv-775-HFS (W.D. Mo.); *Poynter* v. *Vincent*, No. 07-cv-047-NKL (W.D. Mo.); *Joao* v. *Imagitas, Inc.*, No. 06-

like the present case, are nominally "personal capacity" suits seeking billions of dollars in statutory damages from current or former state officials. *See Rine* v. *Dickinson*, No. 3:07-cv-156-VMC-HTS (M.D. Fla.); *Kracum* v. *McCormack*, No. 07-cv-1462-JMR-FLN (D. Minn.); *Poynter* v. *Vincent*, No. 07-cv-047-NKL (W.D. Mo.); *Bogard* v. *Morckel*, No. 5:07-cv-671 (N.D. Ohio).

Although these programs have generated much litigation, Congress never intended either to preclude the states from using motor vehicle registration information to carry out state programs or to preclude the disclosure of this information to contractors assisting the state. Indeed, the DPPA expressly authorizes disclosures made by "any government agency . . . in carrying out its functions," 18 U.S.C. § 2721(b)(1), and expressly contemplates disclosures to state "contractor[s]," *id.* § 2721(a), or to "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions," *id.* § 2721(b)(1).[4] Although the

---

cv-1367-SHS (S.D.N.Y); *Mathias* v. *Imagitas, Inc.*, No. 1:06-cv-2118 (N.D. Ohio); *Bogard* v. *Imagitas, Inc.*, No. 1:06-cv-2868 (N.D. Ohio); *Bogard* v. *Morckel*, No. 5:07-cv-671 (N.D. Ohio). All of these cases are now proceeding in the U.S. District Court for the Middle District of Florida pursuant to Orders of the Judicial Panel on Multidistrict Litigation. *See* Transfer Order, Judicial Panel on Multidistrict Litigation, MDL No. 1828 (May 8, 2007); Conditional Transfer Order, Judicial Panel on Multidistrict Litigation, MDL No. 1828 (May 21, 2007); Transfer Order, Judicial Panel on Multidistrict Litigation, MDL No. 1828 (Oct. 10, 2007); *see also* Order Granting Stipulation to Consolidate Case No. 06-cv-3817 and Case No. 06-cv-3995 (D. Minn. Nov. 22, 2006).

[4] In the litigation pending against Imagitas in Florida, *see Rine* v. *Imagitas, Inc.*, 3:06-cv-690-J-32HTS (M.D. Fla.), the plaintiffs have argued that the government-function exception of Section 2721(b)(1) does not apply. Instead, they point to a separate provision of the DPPA that permits disclosures "[f]or . . . marketing or solicitation if the State has obtained the express consent of the person to whom such personal information pertains," 18 U.S.C. § 2721(b)(12), and argue that this section implies that "express consent" is required for any marketing activity, even if part of a state program. *See* Pls.' Mot. for Partial S.J., *Rine* v. *Imagitas, Inc.*, 3:06-cv-690-J-32HTS (M.D. Fla. Jan. 19, 2007), 9-10. Plaintiffs further contend that the DPPA applies to the mere "use" of personal information.

ultimate merits of these cases are not before this Court, what matters here is that the mere threat of billion-dollar liability, even if very remote, will affect the decisions made by the state officials who are charged with administering state programs.

For this reason, the disposition of this petition carries national ramifications. If the decision of the court of appeals is allowed to stand, then state officials across the country will be on notice that they could face claims for billions of dollars simply by implementing state law.[5] A reasonable

---

See id. at 8-9 (citing 18 U.S.C. §§ 2724(a) and 2725(2)). These contentions not only disregard the plain language of the DPPA, but prove too much. Plaintiffs' position would make it a crime for a state official to implement a state policy to include charitable solicitations in vehicle registration mailing. Ohio, for example, solicits donations to the Children's Save Our Sight program, *see* Ohio Rev. Code Ann. § 4503.104, Kentucky solicits contributions for a state-sponsored, low-income child care assistance program, *see* Ky. Rev. Stat. Ann. § 186.040(4), and Washington solicits donations for state parks, *see* Wash. Rev. Code § 46.16.076. Other states use their vehicle registration forms as marketing devices. Many states use vehicle registration renewal mailings to market specialty license plates. *See, e.g.*, Mass. Gen. L. ch. 90 § 2E; N.Y. Veh. & Traf. Law § 404-c. In addition, Pennsylvania includes promotional tourism information in its vehicle registration renewal mailings, targeted to certain geographic audiences. *See PennDOT & DCED Team Up to Promote Governor Rendell's Tourism Initiative* (Feb. 2005), *available at* http://www.state.pa.us/papower/cwp/view.asp?A=11&Q=440835. All of these activities would be subject to challenge under the *Rine* plaintiffs' reading of the statute. And, more importantly for present purposes, all of these activities are threatened if the court of appeals' decision is allowed to stand.

[5] The Court has often granted certiorari to review cases imposing substantial liability on federal or state governments. *See, e.g., United States* v. *Mitchell*, 463 U.S. 206, 211 (1983) (granting certiorari where lower court decision raised "issues of substantial importance concerning the liability of the United States"); *Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 & n.5 (1977) (accepting review where more than $100 million in revenue was in dispute); *Territory of Alaska* v. *American Can Co.*, 358 U.S. 224, 225 (1959) (granting certiorari due to "fiscal importance of the question" to state of Alaska); *see also Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("This enormous potential liability, which turns

state official would be extremely wary of doing *anything* that could possibly be challenged under even an implausible reading of the DPPA. If the decision is overturned, by contrast, then state officials will once again be empowered to reduce the burden on the public fisc, while taking proper heed of the DPPA and the penalties it imposes upon state DMVs that violate it.

Unless this Court restores Congress's carefully calibrated remedy against state agencies, state officials will be substantially overdeterred and will needlessly forgo opportunities to save taxpayers money. The risk that an expansive interpretation of the DPPA will have a chilling effect is far from speculative, and indeed DPPA litigation is already causing real-world effects. *See* Def's Mot. for S.J., *Rine* v. *Imagitas, Inc.*, No. 3:06-cv-690-J-32HTS (M.D. Fla. Oct. 19, 2007), Ex. H (Deposition of Tamara Dukes) 27:4-11 (describing decision by Virginia to refrain from signing contract with Imagitas pending resolution of DPPA litigation). If states ultimately choose to modify their activities rather than subject their officials to litigation of this sort, this Court might not have another opportunity to address the questions presented in the petition.

It is no answer to suggest that law-abiding state officials have no reason to worry since they will ultimately prevail on the merits, if not on a qualified immunity defense. To the contrary, the risk of billions of dollars of *personal* liability, even if highly unlikely, would inevitably influence the officials' actions. Nor is the possibility of indemnification by the state the answer: a responsible state official would be loath to risk burdening his or her employer with a billion-dollar judgment. In any event, nothing in the text, structure, or purpose of the DPPA suggests that Congress intended to impose such risks on either the states or their employees.

---

on a question of federal statutory interpretation [of the DPPA], is a strong factor in deciding whether to grant certiorari.").

Finally, the impact of the court of appeals' decision will extend beyond programs like DriverSource. Indeed, as explained above, any form of state "marketing or solicitation" that makes use of vehicle registration or driver's license information—including charitable programs—is now at risk. *See supra* n.4. If state officials are personally liable for massive damage awards, then even claims based on erroneous constructions of the DPPA would chill the activity of understandably risk-averse state officials. Absent this Court's review, the court of appeals' interpretation of the DPPA will effectively subject the states to regulation by threat of private class action.

II. NOTHING IN THE DPPA SUGGESTS THAT CONGRESS CONTEMPLATED SUCH AN OUTCOME, WHICH WOULD RAISE SERIOUS ELEVENTH AMENDMENT CONCERNS

The DPPA establishes two separate regimes for the imposition of civil penalties or damages: First, a "person" who "knowingly" violates the Act is subject to private suit. 18 U.S.C. § 2724(a). The court "may award . . . actual damages, but not less than liquidated damages in the amount of $2,500." *Id.* § 2724(b). That standard, however, does not apply to states or state agencies. *Id.* § 2725 (definition of "person" excludes "a State or agency thereof"). Instead, a "State department of motor vehicles that has a policy or practice of substantial noncompliance . . . shall be subject to a civil penalty imposed by the Attorney General of *not more than* $5,000 a day for each day of substantial noncompliance." *Id.* § 2723(b) (emphasis added). By permitting private plaintiffs to file "personal capacity" suits against state officials alleging only that the state officials implemented state law or policy, the court of appeals' decision threatens to undo the balance that Congress struck.

As an initial matter, the approach adopted by the court of appeals defies both the structure of the Act and common sense. While the DPPA caps damages for Attorney General actions against state DMVs at "not more than" $5,000 a day, the court of appeals' decision would permit private actions against the officials who run those agencies, without any cap

on damages. As discussed above, the former reading suitably deters unlawful conduct, while the latter reading will lead to overcompliance by risk-averse state employees. Similarly, while the Act requires "substantial noncompliance" before a state DMV may face liability, the court of appeals' decision would not impose this limitation where the defendant is a state official, as opposed to the DMV. Yet there is not a hint of evidence that Congress intended such anomalous results.

Furthermore, it exalts form over substance to permit private parties to bring massive claims against state officials merely by incanting the phrase "personal capacity." Neither the present case nor the other pending DPPA "personal capacity" suits allege that the individual state officials acted for *personal* gain or based on any *personal* animus. Rather, the officials face suit simply because of the positions they hold in state government. If the current defendants in any of the DPPA suits pending in the lower courts were to leave state government, the plaintiffs in those cases could just as easily assert their multi-billion-dollar claims against the successors to those officials. Congress declined to subject the states to exposure of this sort, and neither that decision nor state sovereign immunity should fall victim to artfully pled "personal capacity" suits that are mere substitutes for actions brought directly against the states.

As a result, the state officials sued in those actions are, in effect, nothing more than proxies for the states they serve. *Cf. Brandon* v. *Holt*, 469 U.S. 464, 470 (1985) (substituting successor official as defendant demonstrates that suit was brought against defendant in official, not personal capacity); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1986) (allegation that suit was against state employee in personal capacity did not control where proceedings made it clear that action was against defendant in official capacity only). Recent developments prove this very point. In the lawsuit filed against current and former Florida state officials challenging the use of DriverSource, the parties signed a letter of understanding to settle the case.

Plaintiffs agreed to drop their personal-capacity claims against the officials in exchange for a promise from the State of Florida—which is not even a party to the lawsuit—to suspend temporarily a portion of its vehicle registration renewal program. *See* Letter of Understanding, *In RE: MDL 1828 Imagitas, Inc., Drivers' Privacy Protection Act Litigation*, No. 3:07-md-00002-TJC-HTS (Oct. 31, 2007), at 3-4. The fact that the plaintiffs sought and obtained equitable relief *from the state itself* indicates the true nature of their suit and the impact of the court of appeals' decision.

Indeed, no matter how it is captioned, "a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101, n.11 (1984) (internal quotation marks omitted). Yet, if allowed to stand, the court of appeals' decision would inevitably have just that result: states would face an unpalatable choice of (1) continuing a program that would subject its officials to the risk (even if remote) of billion-dollar personal liability, (2) indemnifying the officials and thereby saddling taxpayers with a litigation risk that Congress declined to impose, or (3) scrapping a worthwhile and cost-effective state program.

It is therefore inescapable that such suits would in effect operate against the states. And, of course, the Eleventh Amendment precludes suit for money damages against state officers in their official capacities. *See, e.g.*, *Kentucky* v. *Graham*, 473 U.S. 159, 169 (1985). This case thus presents an opportunity not only to interpret the proper scope of the DPPA but to determine whether, and under what circumstances, a plaintiff can evade the Eleventh Amendment's bar by simply suing a state official in his or her personal capacity for acts performed purely as a matter of that individual's

official duties.[6] For these reasons and the reasons stated in the petition, this case presents a significant question of the scope of the Eleventh Amendment.

* * *

Without review from this Court, states will be forced to curb beneficial and lawful programs or risk massive liability for themselves or their officials. Congress did not intend such a dramatic intrusion on the administration of state governments—and, indeed, affirmatively cabined the exposure of the states. That considered judgment should govern resolution of this case and future cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

---

[6] This question has produced varying answers in the courts of appeals. The Fourth Circuit, considering a claim brought under the Family and Medical Leave Act (FMLA), held that all personal-capacity suits under that statute are barred by the Eleventh Amendment. *See Lizzi* v. *Alexander*, 255 F.3d 128, 136-138 (4th Cir. 2001), *overruled in part on other grounds by Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003). The Seventh Circuit, considering a Fair Labor Standards Act claim, barred an personal-capacity suit where the plaintiffs (1) sued state officials merely for implementing a state policy, (2) sought to "accomplish *exactly* what they would accomplish were they allowed to maintain this suit against the state," and (3) sought such astronomical damages that indemnification would "not be an *option*" but a necessity. *Luder* v. *Endicott*, 253 F.3d 1020, 1022-1025 (7th Cir. 2001) (Posner, J.). The Tenth Circuit, by contrast, has held that personal-capacity suits under the FMLA raise no Eleventh Amendment concerns. *See Cornforth* v. *University of Okla. Bd. of Regents*, 263 F.3d 1129, 1132-1133 (10th Cir. 2001).

Respectfully submitted.

JOEL A. MINTZER
B. TODD JONES
HEATHER M. MCELROY
ROBINS, KAPLAN, MILLER
& CIRESI LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500

RANDOLPH D. MOSS
Counsel of Record
ERIC R. COLUMBUS
DANIEL A. ZIBEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 663-6000

NOVEMBER 2007

72

No. 07-197

FILED
NOV 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

FRED O. DICKINSON, ET AL.,
Petitioners,
v.
MARY ANN COLLIER, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

Tod N. Aronovitz
Steven R. Jaffe
Mark S. Fistos
ARONOVITZ JAFFE
Museum Tower, Ste. 2700
150 West Flagler Street
Miami, FL 33131

Joel S. Perwin
Counsel of Record
JOEL S. PERWIN, P.A.
Alfred I. Dupont Bldg., Ste. 1422
169 E. Flagler Street
Miami, FL 33131
(305) 799-6090

John W. Devine
Lawrence D. Goodman
DEVINE GOODMAN PALLOT
RASCO & WELLS, P.A.
777 Brickell Ave., Suite 850
Miami, FL 33131

David D. Welch
DAVID D. WELCH LAW OFFICES
2401 East Atlantic Blvd., Ste. 400
Pompano Beach, FL 33062

Peter A. Portley
PORTLEY AND SULLIVAN
Lighthouse Point Prof. Bld.
2211 E. Sample Rd., Ste. 204
Lighthouse Point, FL 33065

Additional Counsel on Inside Cover

November 5, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Amy Howe
Kevin Russell
Howe & Russell, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Pamela S. Karlan
Jeffrey L. Fisher
Stanford Law School
Supreme Court
Litigation Clinic
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Akin, Gump, Strauss,
Hauer & Feld LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

QUESTIONS PRESENTED

1. Whether the Drivers' Privacy Protection Act ("DPPA") creates a private right of action for damages against State officials for enforcing State laws, policies and practices that allegedly violate the DPPA.

2. Whether a cause of action for billions of dollars in damages against State officials for enforcing State law for the sole benefit of the State and in compliance with State law requirements violates the Eleventh Amendment to the United States Constitution.

3. Whether a federal right is "clearly established" for purposes of qualified immunity when it arises under a federal statute never previously held to create a private cause of action against state actors and when the State officials' conduct complies with mandatory State law obligations.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 10

I. The Eleventh Circuit's Construction Of The DPPA Does Not Warrant Interlocutory Review. 10

A. The Eleventh Circuit's Decision Does Not Conflict With The Decisions Of This Or Any Other Court. 11

B. Petitioners' Claims Concerning The Potential Financial Impact Of This Litigation Upon The State Are Premature. 13

C. Reversing The Eleventh Circuit's Construction Of The DPPA Would Have No Practical Effect On The Outcome Of This Case. 15

D. The Eleventh Circuit's Decision Is Correct. 16

II. There Is No Basis To Grant Review Of Petitioners' Eleventh Amendment Challenge To The DPPA. 19

A. The Eleventh Circuit's Decision Does Not Conflict With The Decision Of Any Other Court. 20

B. This Case Presents A Poor Vehicle For Deciding Petitioners' Eleventh Amendment Challenge To The DPPA. 22

C. The Eleventh Amendment Does Not Bar This Suit. 24

III. The Eleventh Circuit's Rejection Of Petitioners' Qualified Immunity Defense On The Pleadings Does Not Warrant Review..... 28

CONCLUSION 33

TABLE OF AUTHORITIES

Federal Cases

Alden v. Maine, 527 U.S. 706 (1999) 24

Anderson v. Creighton, 483 U.S. 635 (1987) 31

Berman Enters., Inc. v. Jorling, 3 F.3d 602 (2d Cir. 1993) 27

Bingham v. City of Manhattan Beach, 341 F.3d 939 (9th Cir. 2003) 31

Bly-Magee v. California, 236 F.3d 1014 (9th Cir. 2001) 21

Butler v. City of Prairie Village, Kansas, 172 F.3d 736 (10th Cir. 1999) 12

Clark v. Barnard, 108 U.S. 436 (1883) 26

Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 26

Davis v. Scherer, 468 U.S. 183 (1984) 31, 32

Del A. v. Edwards, 855 F.2d 1148 (5th Cir. 1988) 31

Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984) 27

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994) 27

Edelman v. Jordan, 415 U.S. 651 (1974) 26

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 23

Ex parte Young, 209 U.S. 123 (1908) 29

Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002) 18

Fid. Fed. Bank & Trust v. Kehoe, 547 U.S. 1051 (2006) ..... passim

Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991) 21

Fry v. Pliler, 127 S. Ct. 2321 (2007) 16

Greiss v. Colorado, 841 F.2d 1042 (10th Cir. 1988) 26, 27

Guillemard-Ginorio v. Contreras-Gomez, 490 F.3d 31 (1st Cir. 2007) 30

Guinn v. United States, 238 U.S. 347 (1915) 25

Hafer v. Melo, 502 U.S. 21 (1991) ..... passim

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 24, 28, 31, 32

Hope v. Pelzer, 536 U.S. 730 (2002) 25, 30

Howlett ex rel. Howlett v. Rose, 496 U.S. 356 (1990) 17

Jackson v. Ga. Dep't of Transp., 16 F.3d 1573 (11th Cir. 1994) 27

Jackson v. Rapps, 947 F.2d 332 (8th Cir. 1991) 30

Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 16

Kehoe v. Fid. Fed. Bank & Trust, 421 F.3d 1209 (11th Cir. 2005) 13

Lane v. Wilson, 307 U.S. 268 (1939) 30

Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002) 26

Lawrence v. Reed, 406 F.3d 1224 (10th Cir. 2005) 30

Lizzi v. Alexander, 255 F.3d 128 (4th Cir. 2001), *abrogated on other grounds by Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) 12

Luder v. Endicott, 253 F.3d 1020 (7th Cir. 2001) 21

Mason v. Stallings, 82 F.3d 100 (11th Cir. 1996) 12

Nixon v. Herndon, 273 U.S. 536 (1927) 30

Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824) 29

Poindexter v. Greenhow, 114 U.S. 270 (1885) 29

Reno v. Condon, 528 U.S. 141 (2000) 6, 9, 29

Sales v. Grant, 224 F.3d 293 (4th Cir. 2000) 27

Saucier v. Katz, 533 U.S. 194 (2001) 31

Scheuer v. Rhodes, 416 U.S. 232 (1974) 19, 24

Smith v. Ill. Sec'y of State, No. 01C1605, 2003 WL 1908020 (N.D. Ill. Apr. 21, 2003) 11

Smith v. United States, 287 F.2d 299 (5th Cir. 1961) 20

Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995) 27

Sullivan v. Barnett, 139 F.3d 158 (3d Cir. 1998), *rev'd on other grounds sub nom. Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) 25

United States ex rel. Dunleavy v. County of Del., 279 F.3d 219 (3d Cir. 2002), *vacated*, 538 U.S. 918 (2003). 20

United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa, 269 F.3d 932 (8th Cir. 2001) 20, 21

Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) 17

Wilson v. Layne, 526 U.S. 603 (1999) 31

State Cases

Seigle v. Barry, 422 So. 2d 63 (Fla. Dist. Ct. App. 1982), *review denied*, 431 So. 2d 988 (Fla. 1983) 23

Federal Statutes And Constitutional Provisions

U.S. Const. amend. XI ..... passim
Drivers' Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 ..... passim
18 U.S.C. § 2721(a) 4, 16
18 U.S.C. § 2721(b)(12) 3, 5
18 U.S.C. § 2721(b)(12)(B) 3
18 U.S.C. § 2723 ..... 4, 18
18 U.S.C. § 2723(b) 4, 18
18 U.S.C. § 2724 ..... passim
18 U.S.C. § 2724(a) 3, 11, 19
18 U.S.C. § 2724(b) 4, 14
18 U.S.C. § 2725(2) 4, 17
28 U.S.C. § 2403 24
42 U.S.C. § 1983 ..... passim
Pub. L. No. 106-69 5

State Statutes

FLA. STAT. § 119.07(3)(aa)(12) (2003) 5
FLA. STAT. § 119.07(3)(aa)(12) (2004) 7
FLA. STAT. § 119.011 (2005) 23
FLA. STAT. § 284.30 (2007) 15

Other Authorities

138 Cong. Rec. H1785 (1992) 3
139 Cong. Rec. E2747 (1993) 3
139 Cong. Rec. S15745 (1993) 3
140 Cong. Rec. H2518 (1994) 3

1985 Fla. Op. Att'y Gen. 4 23

Brief of Appellants, *Collier v. Dickinson*, 477 F.3d 1306 (11th Cir. 2007) (No. 06-12614) 23

Florida Government-in-the-Sunshine Manual 7

Petition for a Writ of Certiorari, *Fid. Fed. Bank & Trust Kehoe*, 547 U.S. 1051 (2006) (No. 05-919) 13

INTRODUCTION

Petitioners are current and former high-level state officials at the Florida Department of Highway Safety & Motor Vehicles (DHSMV) responsible for establishing policies governing the confidentiality of personal information that the DHSMV collects, in compliance with state and federal law. Petitioners do not contest that for more than four years after the relevant provisions of the Drivers' Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (DPPA) became effective, they knowingly violated its confidentiality provisions by selling citizens' private driver information to mass-marketing firms without the drivers' affirmative consent. The Eleventh Circuit rightly held that under the DPPA's express private right of action, petitioners may be liable for violating respondents' clearly established rights under the Act. Whether petitioners will actually be held liable in this case, once their defenses on the merits are considered, remains to be seen, as does the scope of any liability if respondents prevail.

Petitioners nonetheless ask this Court to take the unusual step of granting immediate review of the court of appeals' interlocutory judgment. In support of this extraordinary request, petitioners do not allege that the Eleventh Circuit's decision conflicts with any other court's construction of the DPPA. Nor do they claim that any court has found that the Eleventh Amendment bars personal-capacity suits against state officials under the DPPA. Instead, petitioners ask this Court to intervene at the outset of this case to review a question of statutory interpretation that arises infrequently, a constitutional objection that has never before been

considered, and a fact-bound denial of qualified immunity. None of these questions warrants this Court's review. Indeed, the questions do not even arise in this case because, contrary to petitioners' assertion, state law did not compel, or even permit, them to compile and sell respondents' private driving records to mass-marketers.

Presumably aware that review in such circumstances is rarely granted, petitioners place critical importance upon their speculation that if this case is allowed to proceed, petitioners may face billions of dollars in liability. *See* Pet. 4. This Court was rightly unmoved by a nearly identical argument when it denied certiorari in another interlocutory appeal arising from DPPA-related litigation just two Terms ago. *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari). Any claims arising from the size of petitioners' potential liability is premature, as class certification has not yet been granted, the merits of petitioners' numerous defenses have yet to be considered, and several questions regarding the scope and availability of a monetary remedy remain to be resolved.

STATEMENT

1. In 1989, a stalker obtained actress Rebecca Schaeffer's unlisted home address from a state motor vehicles department, went to her home, and murdered her. This highly publicized crime raised awareness of the threat to public safety posed by the sale of personal driver records and led Congress to hold hearings on proposed federal legislation. During its investigations, Congress became aware that many

states, like Florida, sold drivers' personal information—including names, phone numbers, social security numbers, and addresses—to mass marketers, raising hundreds of millions of dollars for the states at the cost of citizens' important privacy interests and personal safety. Sec. Amend. Compl. ¶ 12A(xvi); *see also* 138 Cong. Rec. H1785 (1992); 139 Cong. Rec. E2747 (1993); 139 Cong. Rec. S15745, S15761 (1993); 140 Cong. Rec. H2518 (1994).

In response, Congress enacted the DPPA. That Act prohibits a "State department of motor vehicles, and any officer, employee, or contractor thereof," from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity" personal information contained in driving records, except under certain limited circumstances. 18 U.S.C. § 2721. As originally enacted, the law allowed States to disclose a driver's personal information for bulk distribution in surveys, marketing, or solicitations if the State implemented methods and procedures to provide individuals a clear and conspicuous opportunity to prohibit such use. *Id.* § 2721(b)(12) (1997). However, the Act required States to keep the information of those drivers who chose to "opt-out" strictly confidential. *Id.* § 2721(b)(12)(B) (1997).

To ensure vigorous enforcement of the Act, and to provide compensation for victims of its violation, Congress established an express private right of action under the statute. The Act thus provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains . . . ." *Id.* § 2724(a). The statute provides

that the term "person" includes "an individual, organization or entity, but does not include a State or agency thereof." *Id.* § 2725(2). It also provides that a court "may" award successful plaintiffs actual or liquidated damages, punitive damages, reasonable attorneys' fees, and other such relief as the court deems appropriate. *Id.* § 2724(b). The Act authorizes the Attorney General to impose civil penalties for noncompliance on state departments of motor vehicles, *see id.* § 2723(b), but not against state employees, *id.*, upon whom the Act imposes explicit duties, *id.* § 2721(a).

2. The DPPA went into effect on September 13, 1997, three years after its enactment. The interim period allowed several states that engaged in practices the Act now prohibited, including Florida, to modify their laws and policies to come into compliance with the new federal law. Petitioner Fred Dickinson, as Executive Director of the DHSMV, was the Florida official ultimately responsible for ensuring that the Florida DHSMV complied with the DPPA.[1] *See* Sec. Amend. Compl. ¶ 12A(i), (iv). Aware that state law conflicted with the DPPA, petitioner Dickinson took an active role in lobbying the state legislature to amend its public records laws to conform to the federal requirements. *Id.* ¶ 12A(vi). In 1997, just before the DPPA came into effect, Florida enacted such legislation. Under the new, DPPA-compliant state law, the DHSMV allowed drivers to elect to block disclosure of their personal information for marketing or other restricted

---

[1] Dickinson was appointed to that position in 1992 and still held that position when this suit was filed. Sec. Amend. Compl. ¶ 12A(i).

purposes, but DHSMV continued to sell the personal information of drivers who did not "opt out." FLA. STAT. § 119.07(3)(aa)(12) (2003).

3. It soon became apparent to Congress that the "opt-out" provisions of the original version of the DPPA did not adequately protect drivers' privacy. Accordingly, on October 9, 1999, Congress amended the statute to require states to protect drivers' personal information from disclosure unless drivers "opt in" to a state's marketing program. Specifically, the new legislation (known as the Shelby Amendment) required every state motor vehicle department to obtain express consent from an individual before releasing his or her personal information for bulk distribution for surveys, marketing, or solicitations. 18 U.S.C. § 2721(b)(12). Congress set the Amendment's effective date as June 1, 2000 for most States, giving those States nearly eight months to bring their policies and practices into compliance. Pub. L. No. 106-69, 113 Stat. 986, 1025.

Petitioners became aware of the Shelby amendment and its conflict with existing DHSMV practices shortly after its enactment. In early 2000, the American Association of Motor Vehicle Administrators contacted petitioner Sandra Lambert, the DHSMV official responsible for monitoring compliance with changing laws and rules, advising her of the new "opt-in" requirement and proposing methods for helping the agency comply with the new federal law. Sec. Amend. Compl. ¶ 12C(v)-(vi), (xii).[2]

---

[2] The final petitioner-defendant, Carl Ford, served as Assistant Director (and in 2001 became the Director) of the Division of Motor Vehicles, overseeing the budget and

Around the same time, petitioner Dickinson received a legal memorandum from his staff analyzing this Court's then-recent decision in *Reno v. Condon*, 528 U.S. 141 (2000). *Id.* ¶ 12A(xi). That decision rejected a constitutional challenge to the DPPA and, in the process, noted that the Shelby Amendment had recently changed the statute to permit disclosure only when a driver has given express consent. *Condon*, 528 U.S. at 144-45. The day Dickinson received the memo, he wrote a letter to the tax collector for Pinellas County, Florida, advising that "Congress recently amended the DPPA and further restricted the states' ability to disseminate personal information contained in motor vehicle records . . . These changes take effect on June 1, 2000 . . . ." Sec. Amend. Compl. ¶ 12A(ix).

The next day, Dickinson conducted an executive staff meeting with petitioner Lambert and others to discuss the effect of the Shelby Amendment. At that meeting, Dickinson's legislative affairs administrator, Sherry Slepin, reported that the Shelby Amendment would make it unlawful to disclose driver information for bulk distribution without first obtaining a person's affirmative consent. *Id.* ¶ 12A(xiii).

Petitioners continued to receive advice from Slepin about the status and effect of state and federal laws and regulations impacting the DHSMV. *Id.* ¶ 12A(xiv). Petitioner Dickinson had numerous discussions with Slepin regarding the financial impact of the "opt-in" requirement. *Id.* ¶ 12A(xv). Slepin testified to the Florida House Committee on

---

operations of the Division, including the processing of public information requests. *Id.* ¶ 12B(i)-(ii).

Transportation that the Shelby Amendment would result in a loss to the State of around $1.6 million per year. *Id.* ¶ 12A(xvi).

By June 1, 2000, the Shelby Amendment's effective date, Florida was the only state whose laws failed to comply with the new requirements of the revised DPPA. *See Kehoe*, 547 U.S. at 1051 (Scalia, J, concurring in the denial of certiorari). Although aware that the Act now prohibited DHSMV's current practices, petitioners nonetheless decided to continue to sell to mass marketers recompilations of the personal information of Florida drivers who had not opted out of the program. *Id.* ¶¶ 12A(xviii), 12B(vii), 12C(xv). There was no question during this time that state law not only permitted but required petitioners to comply with the DPPA. The State's *Government-in-the-Sunshine Manual*, issued by the Attorney General to assist state agencies in complying with state public disclosure laws, specifically provided that records must remain confidential "when there is an absolute conflict between federal and state law relating to confidentiality of records." Vol. 26, p. 242. Moreover, Florida's sunshine laws did not require disclosure of commercial recompilations of driver data in any event, *see* infra n.9; and, in fact, the State Constitution recognizes citizens' right to privacy. Petitioners nonetheless continued to knowingly violate federal law – and thereby state law as well – for more than *four years*, waiting until the state legislature expressly amended state statutes to reflect the requirements of the DPPA in 2004. *See* FLA. STAT. § 119.07(3)(aa)(12) (2004).

4. Respondents, four Florida drivers and vehicle owners, brought suit against petitioners in their

personal capacities for compiling, reformatting, and selling respondents' personal information to mass marketers without their express consent between the Shelby Amendment's effective date of June 1, 2000 and petitioners' eventual compliance with the Amendment in September 30, 2004. Sec. Amend. Compl. ¶¶ 5-7, 12A(xviii), 12B(vii), 12C(xv). Respondents sought to recover for the violation of their DPPA rights under 42 U.S.C. § 1983 and directly under the DPPA's express private cause of action. *Id.* ¶¶ 25-35.[3] Respondents further requested that the district court certify a class action. *Id.* ¶¶ 15-23.

Prior to ruling on respondents' motion for class certification, the district court dismissed the complaint, finding petitioners entitled to qualified immunity. The court agreed with respondents that petitioners were subject to the DPPA's private right of action. Pet. 37a. And because petitioners did not dispute, at this stage, that they had violated respondents' DPPA rights, the district court held that respondents' "allegations, if true, establish a statutory violation." *Id.* Nonetheless, the court held that petitioners were entitled to qualified immunity because in the court's view, "the state of the law was not sufficiently clear to provide the [petitioners] with 'fair warning' that their conduct violated a statutory right under the novel circumstances of this case." *Id.* at 37a-39a.

---

[3] Petitioners also alleged a violation of their constitutional right to privacy. Sec. Amend. Compl. ¶ 25. The district court dismissed that claim and the Eleventh Circuit affirmed. Pet. App. 3a-4a.

5. The Eleventh Circuit reversed the grant of qualified immunity. *Id.* at 10a-11a. Like the district court, the court of appeals found that "the plain language of the DPPA clearly, unambiguously, and expressly creates a statutory right which may be enforced by enabling aggrieved individuals to sue persons who disclose their personal information in violation of the DPPA." *Id.* at 6a. In the alternative, the court held that respondents also had a cause of action under 42 U.S.C. § 1983 against petitioners for the violation of their statutory DPPA rights under color of law. *Id.* at 6a-9a.

The court of appeals then reversed the grant of qualified immunity, finding that "the plain language of the statute and the case law gave clear notice to [petitioners] that releasing the information in question violated federal law." *Id.* at 9a. Although aware that petitioners asserted that state law compelled their actions, and that no court previously had reason to apply the DPPA to conduct precisely like petitioners', the court of appeals found that "[t]he words of the DPPA alone are specific enough to establish clearly the law applicable to [petitioners'] particular conduct and circumstances and to overcome qualified immunity." *Id.* (citation and internal quotation marks omitted). Lest there be any doubt, the court noted, this Court itself had made it clear in *Condon* that the Shelby Amendment requires a state to "obtain a driver's affirmative consent" before "disclos[ing] the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.* at 10a (quoting *Condon*, 528 U.S. at 144-45) (emphasis omitted).

REASONS FOR DENYING THE WRIT

Petitioners' request for interlocutory review of the court of appeals' ruling on a question of first impression is premature in every sense of the word. The request is made too early in the development of the law regarding the scope of the DPPA's private right of action because this is the first decision from any court of appeals to confront it. The request for review is also brought too early in the life of this case, arising not after final judgment—when this Court could more accurately assess petitioners' claims regarding the financial impact of the litigation upon the State—but upon the denial of qualified immunity on the pleadings. That denial was correct, in any event, as there is no question that petitioners knowingly and persistently violated respondents' clearly established rights under the DPPA. Taking the complaint as true, nothing in the statute or this Court's qualified immunity jurisprudence could have led petitioners to a reasonable belief that they could ignore the plain mandate of a federal statute, even if state law had permitted a contrary course of action, or because they might have thought that they could get away with violating federal law without risk of personal liability.

I. The Eleventh Circuit's Construction Of The DPPA Does Not Warrant Interlocutory Review.

Petitioners first seek review of their claim that state officials are not "persons" subject to suit under the DPPA when enforcing state laws, policies, and practices that violate the Act. That issue does not warrant review by this Court at this time as it

implicates no circuit conflict, arises rarely, and can be addressed, if necessary, on review of a final judgment. Indeed, this Court recently denied review of an interlocutory appeal in a similar case involving the DPPA that purported to raise "an important question of statutory construction," and the specter of "enormous potential liability." *See Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari). There is no basis for a different result here.

A. The Eleventh Circuit's Decision Does Not Conflict With The Decisions Of This Or Any Other Court.

Petitioners do not argue that review by this Court is required to resolve any division of authority regarding personal-capacity suits against state officials under the DPPA. And, in fact, no such division exists. This question has rarely arisen and the few times it has, the courts have permitted the suit to go forward.[4]

Unable to point to a division over the proper interpretation of the DPPA, petitioners attempt to insinuate a circuit split at a higher level of generality by citing cases construing the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). *See* Pet. 15-16. But none of the decisions petitioners cite purports to establish a general principle, applicable to all legislation, that statutes must be construed to exclude state officials

---

[4] In addition to the court of appeals' decision in this case, at least one district court has concluded that the term "person" in § 2724(a) includes state officials. *See Smith v. Ill. Sec'y of State*, No. 01C1605, 2003 WL 1908020 (N.D. Ill. Apr. 21, 2003).

from personal liability whenever they enforce state policies. As petitioners themselves repeatedly emphasize, whether a state official may be sued under a particular statute depends critically on the particulars of that statute—the language of the statute, "the design of the statute," "the statutory context," and "the structure of the [statute]'s remedial provisions." *Id.* It is thus unsurprising that even the circuits petitioners cite construe some statutes to permit personal capacity suits against state officials, and others to preclude them. *See id.* at 16 (relying on the Tenth Circuit's refusal to allow personal capacity suit under Americans with Disabilities Act, but acknowledging that the same court permits such suits under the Family and Medical Leave Act).[5]

The only reliable way to determine whether the Eleventh Circuit's decision will conflict with other circuits' interpretation of the DPPA is to wait until

---

[5] Petitioners' suggestion that there is a conflict between the decision in this case and the Tenth Circuit's decision in *Butler v. City of Prairie Village, Kansas*, 172 F.3d 736 (10th Cir. 1999), is particularly strange. The Tenth Circuit's decision itself notes that on the question actually decided in *Butler*—whether the ADA permits personal capacity suits against supervisory employees—the Tenth and Eleventh Circuits are in complete accord. *See Butler*, 172 F.3d at 744 (citing *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996)). The Eleventh Circuit's construction of the ADA's employment provision is likewise consistent with the Fourth Circuit's decision in *Lizzi v. Alexander*, 255 F.3d 128, 136-38 (4th Cir. 2001), *abrogated on other grounds by Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), which construed another federal employment statute, the FMLA, as not imposing liability on state agents who are not "employers" subject to the Act.

those circuits are confronted with and decide the issue presented here.

B. Petitioners' Claims Concerning The Potential Financial Impact Of This Litigation Upon The State Are Premature.

In an attempt to overcome the lack of a circuit split and the infrequency with which the first question presented arises, petitioners resort to claims of financial calamity for the State unless this Court disregards its ordinary standards for certiorari and grants immediate interlocutory review. Pet. 4. This argument is both familiar and premature.

The argument is familiar because this Court recently denied review when confronted with nearly identical arguments raised by private defendants sued for purchasing drivers' personal information from the Florida DHSMV in violation of the DPPA. *See Kehoe*, 547 U.S. at 1051 (Scalia, J, concurring in the denial of certiorari). *Kehoe* presented the question whether a plaintiff must show "actual damages" to recover under the DPPA's liquidated damages provision. *Id.* The district court had granted summary judgment on that question, and the Eleventh Circuit reversed. *See Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005). Petitioners argued that the $40 billion possibly at stake in the litigation warranted this Court's immediate review. *Kehoe*, 547 U.S. at 1051 (Scalia, J., concurring in the denial of certiorari); Petition for a Writ of Certiorari at 8-12, *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (No. 05-919). But, as Justice Scalia explained, even if the size of a judgment might provide an eventual basis for this

Court's review, certiorari was premature until that judgment was issued and became final. *Kehoe*, 547 U.S. at 1051 (Scalia, J., concurring in the denial of certiorari).

Petitioners have provided no reason why this case warrants a different result. As in *Kehoe,* there has been no determination of liability, and petitioners "strongly dispute plaintiffs' claims" on the merits. Pet. 4.[6] In fact, petitioners' claims about the scope of their potential liability are even more speculative than those made in *Kehoe*. First, the district court has not yet ruled on respondents' motion for class certification. As a result, petitioners presently face only four individual plaintiffs with combined liquidated damages claims of only $10,000.

Second, even if the district court grants class certification and finds petitioners liable, it is uncertain what damages the court would award respondents. The DPPA provides that the "court *may* award" one of four types of relief, including liquidated damages. 18 U.S.C. § 2724(b) (emphasis added). The Eleventh Circuit has held that "the use of the word 'may' implies a degree of discretion," leaving open the possibility that the district court may award less than the full amount of liquidated damages permitted by the statute. *Kehoe*, 421 F.3d at 1217.

Third, it is by no means certain that the State will ultimately bear the cost of any eventual judgment against these individual defendants. The State is under no federal obligation to indemnify petitioners. Instead, Florida has voluntarily

---

[6] On October 29, 2007, petitioner Lambert sought an order to amend her answer..

established a risk management trust fund "to provide insurance . . . for . . . federal civil rights actions under 42 U.S.C. § 1983 or similar federal statutes." FLA. STAT. § 284.30 (2007). It is unclear whether the DPPA qualifies as a "similar federal statute[]," and in any case, the state legislature controls the scope of any indemnification and may amend its insurance scheme whenever it chooses.

C. Reversing The Eleventh Circuit's Construction Of The DPPA Would Have No Practical Effect On The Outcome Of This Case.

In addition to its interlocutory posture, this case is a poor vehicle for resolving the first question presented because this case will go forward regardless of how that question is answered.

Petitioners seek review of the court of appeals' determination that respondents have a cause of action under the DPPA itself; they do not seek review of the court of appeals' separate determination that even if the DPPA cause of action fails, respondents may pursue their DPPA claims under 42 U.S.C. § 1983. *See* Questions Presented, Pet. i; Pet. App. 6-9. Petitioners' passing assertion in a footnote (Pet. 18 n.4) that reversal of the DPPA holding would, *a fortiori*, require reversal of the § 1983 holding is wrong[7] and, more importantly, does not bring the issue within the questions presented by the petition.

---

[7] As the court of appeals' decision makes clear, the question whether a statute provides an express cause of action and whether § 1983 provides an avenue for enforcing federal statutory rights are distinct legal inquiries with their own quite different analyses. *See* Pet. App. 4a-9a.

See, e.g., *Fry v. Pliler*, 127 S. Ct. 2321, 2327-28 (2007) (holding that brief footnote in petition did not put the issue within the question presented); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.* 510 U.S. 27, 31-32, 31 n.5 (1993) (holding that discussion of issue in text of petition did not bring the issue within the questions presented). As a result, even if this Court granted certiorari and reversed the Eleventh Circuit's DPPA holding, respondents would be free to pursue their DPPA claims under § 1983.

D. The Eleventh Circuit's Decision Is Correct.

Certiorari is also unwarranted because the Eleventh Circuit correctly interpreted the DPPA.

1. Petitioners do not question that they fall within the ordinary meaning of "persons." Nor can they reasonably deny that they are among the "persons" Congress specifically had in mind when it spoke of a "person who knowingly . . . discloses . . . personal information, from a motor vehicle record, for a purpose not permitted by" the Act. 18 U.S.C. § 2724; *see also id.* § 2721(a) ("A State department of motor vehicles, *and any officer, employee,* or contractor thereof, shall not knowingly disclose" protected information) (emphasis added). As a result, petitioners grudgingly admit, as they must, that at least in *some* cases, state officials are "persons" intended to be subject to liability when they violate the DPPA. *See* Pet. 15.

Petitioners nevertheless insist that they are not "persons" when they violate the Act by administering a state "policy or practice" that conflicts with the federal law. *Id.* That theory conflicts with the plain

language of the statute, the legal backdrop against which it was enacted, and the basic purposes of the legislation.

The DPPA's broad definition of "person" excludes only States and state agencies, but not state officials. 18 U.S.C. § 2725(2). That exclusion was not accidental. Congress plainly considered who should share in the State's protection from liability, taking the time and care to specify that state agencies as well as the State itself should be outside the scope of § 2724. Nor is it unusual. In excluding States and state agencies, but not state officials in their personal capacities, Congress followed the pattern established by 42 U.S.C. § 1983, the principal federal statute used to remedy violations of federal rights by any "person" acting under color of state law. At the time Congress enacted the DPPA, it was well-established that the word "person" in § 1983 excluded States and state agencies, a result driven in part by this Court's construction of the scope of the Eleventh Amendment. *See Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-66 (1989). But this Court had been equally clear that state officials sued in their personal capacities *are* persons under the statute and are *not* entitled to share in the state's sovereign immunity. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991). "Officers sued in their personal capacity come to court as individuals," the Court had explained. *Id.* at 27. The fact that a plaintiff's injury arises because the official has misused his or her official powers is cause for condemnation and liability, not for extending to the official the protection from suit afforded to the state itself. *See id.* at 27-28.

The structure of the DPPA confirms that Congress intended the term "person" to have the same meaning in the DPPA. As discussed, the Act uses the same term ("person") as § 1983, and expressly excludes from the definition the entities this Court had excluded from coverage under the same language of the older statute. And in doing so, Congress protected from private suit all entities protected from such suits by the Eleventh Amendment, while allowing suit against those not entitled to the protection of sovereign immunity.

2. Petitioners object that allowing personal-capacity suits against officials for enforcing illegal state policies is inconsistent with § 2723's authorization of the Attorney General to levy civil penalties against any "State department of motor vehicles that has a policy or practice of substantial noncompliance." 18 U.S.C. § 2723(b). That argument fails because Sections 2723 and 2724 serve different, and complimentary, purposes: the private right of action provides a means to redress injuries inflicted upon citizens, while the civil penalty provision recognizes the United States' independent sovereign interest in ensuring compliance with federal law. The remedial provision's different treatment of state officials compared to states and state agencies simply reflects Congress's awareness of the limits of its authority under the Eleventh Amendment, not any intent to provide a safe haven for state officials who blatantly violate federal law. *Cf. Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 763 (2002) (although Eleventh Amendment limits private suits against States, it does not prevent suits brought by the federal government).

Petitioners' interpretation, on the other hand, requires this Court to believe that Congress intended to impose duties upon state officials, in addition to imposing duties on state agencies, but to provide no remedy for the officials' violation of those express duties (only injunctive relief to prevent future violations), having given the Attorney General authority to impose civil penalties only against States and state agencies (and only for a pattern of violations), but not to redress or enforce the statutory obligations of state officials. This illogical gap in the statute's enforcement scheme informs the definition of the word "person" in § 2724(a). Given that the statute expressly imposes duties on state officers, and that state officers, unless otherwise exempted from coverage, are certainly "persons," and that there is no other way to redress their transgressions, the court of appeals' interpretation is more sensible than petitioners'.

II. There Is No Basis To Grant Review Of Petitioners' Eleventh Amendment Challenge To The DPPA.

This Court has repeatedly explained that "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials." *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974)). Nevertheless, petitioners claim that the Eleventh Amendment is violated "[w]here, as here, a State official is sued for billions of dollars based on nothing more than his or her compliance with State law and when the beneficiary of the [o]fficial's action is the State." Pet. 19. That claim does not warrant this

Court's review. No court has ever accepted it, and it is squarely foreclosed by this Court's precedents.

A. The Eleventh Circuit's Decision Does Not Conflict With The Decision Of Any Other Court.

Petitioners do not attempt to argue that the decision below creates a division of authority over whether the DPPA violates the Eleventh Amendment. Indeed, petitioners appear to be the first litigants to raise an Eleventh Amendment objection to the DPPA's private right of action. Instead, petitioners rely on what they describe as a "marked tension" between the Eleventh Circuit's decision below and the decisions of other courts interpreting different statutes. Pet. 20. That claim provides no basis for certiorari in this case and is baseless in any event.

Petitioners first argue that the decision below is at odds with three decisions construing the False Claims Act (FCA). *See Id.* at 20-21. Yet, two of those cases did not involve state officials or even mention the Eleventh Amendment. *See Smith v. United States*, 287 F.2d 299 (5th Cir. 1961); *United States ex rel. Dunleavy v. County of Del.*, 279 F.3d 219 (3d Cir. 2002), *vacated*, 538 U.S. 918 (2003). The third FCA decision, *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, did involve a state official, but the court explicitly disclaimed that it was deciding any Eleventh Amendment question. 269 F.3d 932, 937 n.3 (8th Cir. 2001) ("[W]e need not consider whether a state official sued in his individual capacity is a person under the FCA or whether the claims against

[the defendant] are barred by the Eleventh Amendment.").[8]

Petitioners next argue that the Eleventh Circuit's holding creates a split with decisions from the Fourth and Seventh Circuits involving two employment statutes: the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). *See* Pet. 21-22. Each involved employees' attempts to hold individual supervisors personally responsible for violations of statutes that impose obligations on the workers' true employer—the State. In such cases, the courts determined that a suit against the supervisor was, of necessity, a suit against the State. *See, e.g.*, *Luder v. Endicott*, 253 F.3d 1020, 1024 (7th Cir. 2001) (finding the effect of such a personal-capacity suit to be "identical to a suit against the state"). But other than establishing the uncontested proposition that the Eleventh Amendment precludes a suit that is, in effect, against the State itself, none of these decisions commits the authoring circuit to hold the DPPA's private right of action unconstitutional. Just as clearly, none of the decisions accepts the constitutional principle petitioners assert in this

---

[8] Moreover, the dicta in *Gaudineer* upon which petitioners rely was ill-considered, based on the court's mistaken reading of *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2001), as holding that in deciding a sovereign immunity claim, the court "should look at whether the alleged conduct of the [official] was 'outside of [his] official duties." 269 F.3d at 937. But the cited passage in *Bly-Magee* was describing the limits of the *absolute immunity* afforded state prosecutorial decisions, an immunity that does not apply when prosecutors act "outside of their official duties." 236 F.3d at 1018 (citing *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991) (involving the scope of absolute immunity for government prosecutors)).

case—*i.e.*, that a suit against a public official violates the Eleventh Amendment when the official is implementing a state policy, but not when the official is acting on his or her own initiative.

It remains possible, of course, that someday one of these circuits, when called upon to decide the question presented in this case, may reach a conclusion in conflict with the Eleventh Circuit's decision here. But until that day comes, there is no need for this Court to intervene to settle petitioners' hypothesized conflict.

B. This Case Presents A Poor Vehicle For Deciding Petitioners' Eleventh Amendment Challenge To The DPPA.

Even if the petition raised an Eleventh Amendment question appropriate for review by this Court, the present interlocutory posture of this case makes it a poor vehicle for resolving that issue.

Petitioners ask this Court to decide whether "a cause of action [1] *for billions of dollars* in damages [2] against State officials *for enforcing State law* for the sole benefit of the State and in compliance with State law requirements" violates the Eleventh Amendment. Pet. i (emphasis added). Neither highlighted aspect of this question is squarely presented in this case in its present preliminary posture. First, petitioners can only speculate as to whether respondents will obtain any judgment at all, how large that judgment may be, and whether the State will choose to indemnify petitioners. Second, respondents have strongly contested petitioners' assertion that their conduct was "in compliance with State law requirements," *id.*, and the lower courts

have never resolved the question. *See* Brief of Appellants at 22-27, *Collier v. Dickinson*, 477 F.3d 1306 (11th Cir. 2007) (No. 06-12614).[9] Because this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004), the Court should not grant certiorari to decide a question that the lower courts have not concluded is even presented in this case.

---

[9] Petitioners rely on Article I, § 24(a) of the Florida Constitution, which provides citizens with "the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state . . . ." However, not every document that a state agency creates constitutes a "public record" within the meaning of this provision. Florida law defines "public records" as documents "made or received pursuant to law or ordinance or in connection with the *transaction of official business* by any agency." FLA. STAT. § 119.011(11) (2005) (emphasis added). While the basic driving records the State maintains may fall within this definition, the databases petitioners developed for sale (consisting of a compilation of data from various official records) were not made for the transaction of any official state business; petitioners created them solely to sell to mass-marketers. Sec. Amend. Compl. ¶ 11. As the Florida courts have explained, "[i]t is not the intent of the [open records] law to put public officials in the business of compiling charts and preparing documentary evidence. The intent is rather to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers." *Seigle v. Barry*, 422 So. 2d 63, 66 (Fla. Dist. Ct. App. 1982), *review denied*, 431 So. 2d 988 (Fla. 1983). Accordingly, Florida law did not compel petitioners to sell the compiled driver databases at issue in this case. *Cf.* 1985 Fla. Op. Att'y Gen. 4. Furthermore, in light of Florida's constitutional right of privacy, *see* Art. I, § 23, disclosure of drivers' information may violate Florida's constitution.

Finally, although required by 28 U.S.C. § 2403 to notify the Attorney General of their constitutional challenge to this federal statute, petitioners have not done so. As a result, the case comes to this Court without the benefit of the participation of the United States in the proceedings below. The Court would be better served by awaiting a case in which the Attorney General has been given a fair opportunity to defend the constitutionality of the Act in the court of appeals and to participate in the certiorari process in this Court.

C. The Eleventh Amendment Does Not Bar This Suit.

Petitioners' Eleventh Amendment challenge lacks merit in any event. This Court has repeatedly held that the Eleventh Amendment does not bar personal-capacity suits against public officials and none of the Court's decisions has turned on the amount of the damages claimed against the defendants. *See Hafer*, 502 U.S. at 30-31 (1991); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999). Petitioners nevertheless claim that the result must be different when the official is acting in compliance with an invalid state law or when the official is indemnified by the State and cannot satisfy the judgment on his own. This Court's precedents preclude both claims.

1. In *Hafer*, this Court explicitly rejected the petitioners' first assertion. Much like petitioners here, the petitioner in *Hafer* "[sought] to overcome the distinction between official- and personal-capacity suits by arguing that . . . liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when injuring the plaintiff." 502 U.S. at 27. This Court, however, held that the Eleventh Amendment did not prohibit subjecting state officials to personal liability for acts "both within the official's authority and necessary to the performance of governmental functions." *Id.* at 28. Accordingly, this Court and others have allowed imposition of civil, or even criminal, liability against public officials enforcing state law or policy, for the benefit of the state, when the state law was clearly preempted by federal law. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002) (holding state prison officials liable under § 1983 for implementing state policy found to be unconstitutional); *Guinn v. United States*, 238 U.S. 347 (1915) (upholding criminal liability for officials who conspired to deprive legal citizens their right to vote by enforcing a state constitutional amendment contrary to the Fifteenth Amendment); *Sullivan v. Barnett*, 139 F.3d 158, 179-80 (3d Cir. 1998) (holding that state officials may be liable in their individual capacity for following unconstitutional state regulations), *rev'd on other grounds sub nom. by Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

"To be sure," this Court recognized in *Hafer*, "imposing personal liability on state officers may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence."

502 U.S. at 31. Accordingly, the law protects public officials from unfair liability for enforcing state law through the doctrine of qualified immunity, not by conferring absolute sovereign immunity for their unlawful conduct. *See id.* at 29.

2. This Court's precedents also dictate that a State's decision to indemnify its officials for violations of federal law does not immunize them from personal liability.

Though the Eleventh Amendment precludes the involuntary imposition of a judgment for money damages directly upon the State, it does not apply when a State volunteers to be subject to such a judgment or to bear its costs.[10] This Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). As a result, the Eleventh Amendment permits a federal court to impose a money judgment upon a state when it has consented to suit by statute or litigation conduct. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619-20 (2002).

As the courts of appeals have uniformly concluded, there is no basis for a different conclusion

---

[10] Contrary to petitioners' suggestion (Pet. 22), nothing in *Edelman v. Jordan*, 415 U.S. 651 (1974), is to the contrary. *See Greiss v. Colorado*, 841 F.2d 1042, 1046 (10th Cir. 1988) ("*Edelman* was concerned with claims for retroactive relief that *by their nature must* be paid from public funds, not actions directed against individuals that may ultimately be satisfied with state monies solely because the state has chosen to provide indemnification.").

when the State voluntarily consents to pay judgments imposed upon state officials for violations of federal law. *See Sales v. Grant*, 224 F.3d 293, 297-98 (4th Cir. 2000); *Jackson v. Ga. Dep't of Transp.*, 16 F.3d 1573, 1577-78 (11th Cir. 1994); *Berman Enters., Inc. v. Jorling*, 3 F.3d 602, 606 (2d Cir. 1993); *Greiss v. Colorado*, 841 F.2d 1042, 1045 (10th Cir. 1988); *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994); *Spruytte v. Walters*, 753 F.2d 498, 512 & n.6 (6th Cir. 1985), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Demery v. Kupperman*, 735 F.2d 1139, 1147-48 (9th Cir. 1984). To hold otherwise would

> permit a state to eviscerate completely the rule that governmental officers are not immune from monetary liability when sued in their individual capacities. And this evisceration would come at no cost to the states, for . . . once a state promised to indemnify officers sued in their individual capacities, the 'insurance fund' established to finance the promised indemnification would not have to contain any funds at all, given that all suits in federal court against state officers would be prohibited absent consent by the state.

Sales, 224 F.3d at 298.

III. The Eleventh Circuit's Rejection Of Petitioners' Qualified Immunity Defense On The Pleadings Does Not Warrant Review.

Petitioners also ask this Court to review the Eleventh Circuit's fact-bound determination that, on the pleadings of this case, petitioners are not entitled to qualified immunity. Recognizing that the Eleventh Circuit's decision does not raise any legal question dividing the lower courts, petitioners instead ask this Court to grant certiorari to consider an unprecedented revision to established qualified immunity doctrine, asserting that qualified immunity protects them from the consequences of their clearly unlawful conduct so long as it was not clearly established that their actions pursuant to state law subjected them to personal liability. That invitation should be denied.

1. Qualified immunity shields state officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case, the court of appeals had little difficulty deciding that petitioners' conduct violated respondents' clearly established rights under the DPPA. The Act plainly prohibited petitioners from selling respondents' private drivers information without their consent, yet petitioners sold the information anyway.

To be sure, petitioners claim they were acting to comply with state law which, they say, required the disclosures. But, even if that were true, reasonable officials in petitioners' position could not have

believed that their conduct was lawful. For over a century, this Court has made clear that when faced with a conflict between local and national law, the Supremacy Clause requires state officials to conform their conduct to the requirements of federal law. *See, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); *Poindexter v. Greenhow*, 114 U.S. 270 (1885); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824).[11] Of course, when the mandate of federal law, or the conflict with state law, is unclear, the fact that an official was acting in compliance with state law may lend support to a claim of qualified immunity. *See* Pet. 24-25. The Eleventh Circuit did not hold otherwise. Instead, the court simply concluded that there was no ambiguity about petitioners' obligations in this case. *See* Pet. App. 9a (finding that the "words of the DPPA alone are 'specific enough to establish clearly the law applicable to particular conduct and circumstances'" in this case, thereby precluding any claim of qualified immunity) (citation omitted).

Denying qualified immunity in such circumstances is entirely consistent with the

---

[11] For this reason, petitioners' argument that this Court's opinion in *Reno v. Condon* "did not address the scope of the preemption or discuss the preemption of particular State laws" is unavailing. Pet. 23-24. Even absent the decision in *Condon* it should have been perfectly clear to reasonable state officials that they were prohibited from disclosing the information the DPPA made confidential, any state law to the contrary notwithstanding. Moreover, to say that this Court's opinion in *Condon* did not address the scope of the DPPA's preemption is not accurate. The Court made quite clear that because the Act was a constitutional exercise of Congress's legislative authority, South Carolina officials were compelled to comply with it, even though state law directed otherwise. *See* 528 U.S. at 147-48.

decisions of this Court and other courts of appeals. Neither this Court nor any other has ever held that "courts should presume that officials are entitled to qualified immunity" whenever "State law imposes obligations on State officials" in conflict with federal law. Pet. 25. Moreover, both this Court and the courts of appeals have routinely denied qualified immunity for officials purporting to follow state law when the conduct violated clearly established federal rights. *See, e.g.*, *Hope*, 536 U.S. at 741-46 (holding that state prison officials were not entitled to qualified immunity for Eighth Amendment violations though they followed the State's Department of Corrections' practice of handcuffing inmates to a hitching post for refusing to work); *Lane v. Wilson*, 307 U.S. 268, 269-77 (1939) (upholding verdict against state election officials enforcing state election law in violation of Fifteenth Amendment); *Nixon v. Herndon*, 273 U.S. 536, 539-41 (1927) (allowing damage suit to proceed against state election officials who in following state law violated the Fourteenth Amendment); *Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31 (1st Cir. 2007) (rejecting qualified immunity for insurance commissioners who suspended agent licenses under a Puerto Rico Insurance Code that clearly violated due process); *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005) (same for chief of police who enforced clearly unconstitutional derelict vehicle ordinance); *Jackson v. Rapps*, 947 F.2d 332, 333, 338-39 (8th Cir. 1991) (same for defendants who implemented a reimbursement policy under state law contrary to existing federal regulations).

At any rate, even if this Court adopted the presumption petitioners advocate, it would do them

no good in this case. *See* Pet. App. 9a-10a. Such a presumption easily would be overcome given the DPPA's clear and unequivocal prohibition and petitioners' presumed (and, in this case, actual) knowledge of both the federal prohibition and its supremacy.

2. Petitioners also argue that they are entitled to qualified immunity because their personal liability for violating respondents' clearly established federal rights was not clearly established until the decision in this case. Pet. 25-27. Such arguments have been rejected by every court of appeals to consider them,[12] and for good reason—they are directly contrary to this Court's decisions and the underlying purposes of the qualified immunity doctrine.

Qualified immunity turns solely on the clarity of the defendant's legal obligations and the unlawfulness of his or her conduct. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (explaining that the qualified immunity inquiry focuses on "whether it would be clear to a reasonable officer that his *conduct* was unlawful in the situation he confronted") (emphasis added); *Anderson v. Creighton*, 483 U.S. 635 (1987) (same); *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999) (same); *Harlow*, 457 U.S. at 819 (same).[13] "No other 'circumstances' are relevant to

---

[12] *See, e.g.*, *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 947-48 (9th Cir. 2003); *Del A. v. Edwards*, 855 F.2d 1148, 1152 (5th Cir. 1988).

[13] The cases petitioners cite are not to the contrary: each case looks to whether the right, rather than the remedy, was clearly established. In *Anderson v. Creighton*, this Court held—in the very language petitioners quote (Pet. 26)—that the "contours of the *right* must be sufficiently clear that a

the issue of qualified immunity." *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

Nor would any legitimate purpose be served by immunizing state officials who knew they were engaging in unlawful behavior, simply because they may have reasonably believed that they could get away with the violation without subjecting themselves to personal liability. Qualified immunity exists to avoid discouraging officials from exercising their discretion and disrupting government with insubstantial claims when federal obligations were unclear. *Harlow*, 457 U.S. at 816-17. But when "an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.* at 819.

---

reasonable official would understand that what he is *doing* violates *that right.*" 483 U.S. at 640 (emphasis added). Nothing in *Anderson* suggests that once the contours of the plaintiff's substantive right is clear, qualified immunity may nonetheless be available if the availability of a cause of action for damages was not yet clearly established. Petitioners' citation to a footnote in *Davis v. Scherer*, 468 U.S. 183 (1984), *see* Pet. 26, is no more availing. There, this Court rejected the argument that qualified immunity was defeated because the defendants' conduct, in addition to violating a federal right, also violated a clear *state* regulation. This was so, the Court explained, because the state regulation was not the "statute or regulation [that provided] the basis for the cause of action sued upon." *Id.* at 194 n.12. That statement did not purport to establish that qualified immunity requires both a violation of a clearly established federal right as well as the existence of a clearly established federal cause of action. It simply held that what must be clearly established is the right that forms the "basis of the cause of action sued upon" (*i.e.*, the federal claim), rather than some other state or federal right that is not the subject of the plaintiff's claim. *Id.*

Here, petitioners not only failed to hesitate, but made a conscious decision to defy the clearly established requirements of federal law, when they knew that any state law requirement to the contrary must yield. The Eleventh Circuit's decision to deny qualified immunity in such circumstances is neither troubling nor worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Tod N. Aronovitz
Steven R. Jaffe
Mark S. Fistos
ARONOVITZ JAFFE
Museum Tower, Ste. 2700
150 West Flagler Street
Miami, FL 33131

John W. Devine
Lawrence D. Goodman
DEVINE GOODMAN PALLOT
RASCO & WELLS, P.A.
777 Brickell Ave., Ste. 850
Miami, FL 33131

Amy Howe
Kevin Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Joel S. Perwin
Counsel of Record
JOEL S. PERWIN, P.A.
Alfred I. Dupont Bldg.,
Ste. 1422
169 E. Flagler Street
Miami, FL 33131
(305) 799-6090

David D. Welch
DAVID D. WELCH LAW
OFFICES
2401 East Atlantic Blvd.,
Ste. 400
Pompano Beach, FL 33062

Peter A. Portley
PORTLEY AND SULLIVAN
Lighthouse Point Prof. Bld.
2211 E. Sample Rd., Ste. 204
Lighthouse Point, FL 33065

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

November 5, 2007

13

(4)

No. 07-197

FILED
NOV 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

FRED O. DICKINSON, III, ET AL.,
Petitioners,

v.

MARY ANN COLLIER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

BILL MCCOLLUM
ATTORNEY GENERAL OF FLORIDA
LOUIS F. HUBENER, III
OFFICE OF THE ATTORNEY GENERAL
SCOTT D. MAKAR
SOLICITOR GENERAL
Florida Capitol
400 S. Monroe Street
Tallahassee, FL 32399-6536
(850) 414-3300

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

November 19, 2007

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
ARGUMENT	2
I. THE DPPA DOES NOT AUTHORIZE PERSONAL-CAPACITY SUITS FOR DAMAGES AGAINST STATE OFFICIALS IN THESE CIRCUMSTANCES	2
II. THE ELEVENTH AMENDMENT BARS SUITS AGAINST STATE OFFICIALS BASED SOLELY ON THEIR FULFILLMENT OF STATE-LAW DUTIES	6
III. THE STATE OFFICIALS WERE ENTITLED TO QUALIFIED IMMUNITY	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 5, 6
Butler v. *City of Prairie Vill., Kan.*, 172 F.3d 736 (10th Cir. 1999) 3
City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005) 5
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 3
Dennis v. *Higgins*, 498 U.S. 439 (1991) 11
Edelman v. *Jordan*, 415 U.S. 651 (1974) 10
Fed. Mar. Comm'n v. *S.C. Ports Auth.*, 535 U.S. 743 (2002) 4
Fid. Fed. Bank & Trust v. *Kehoe*, 547 U.S. 1051 (2006) 3
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) .. 5
Guinn v. *United States*, 238 U.S. 347 (1915) 9
Hafer v. Melo, 502 U.S. 21 (1991) 9
Hope v. *Pelzer*, 536 U.S. 730 (2002) 9
Lane v. *Wilson*, 307 U.S. 268 (1939) 10
Lizzi v. *Alexander*, 255 F.3d 128 (4th Cir. 2001), *abrogated on other grounds by Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003) 3
Luder v. *Endicott*, 253 F.3d 1020 (7th Cir. 2001) 7
Michel v. *Douglas*, 464 So. 2d 545 (Fla. 1985) 8
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 1, 4
Montgomery v. *Maryland*, 266 F.3d 334 (4th Cir. 2001), *vacated on other grounds*, 535 U.S. 1075 (2002) 7
Nixon v. *Herndum*, 273 U.S. 536 (1927) ..... ,10

TABLE OF AUTHORITIES – continued

	Page
Smith v. *United States*, 287 F.2d 299 (5th Cir. 1961)	7
Staples v. *United States*, 511 U.S. 600 (1994)	10
United States ex rel. Dunleavy v. *County of Del.*, 279 F.3d 219 (3d Cir. 2002), *vacated on other grounds*, 538 U.S. 918 (2003)	7
United States ex rel. Gaudineer & Comito, LLP v. *Iowa*, 269 F.3d 932 (8th Cir. 2001)	7
Wilson v. *Lane*, 526 U.S. 603 (1999)	11
Ex Parte Young, 209 U.S. 123 (1908)	10

CONSTITUTION AND STATUTES

18 U.S.C. § 2722	2
Fla. Const. art I, § 24	9
Fla. Stat. § 119.07(3)	8
Fla. Stat. § 320.05(3)	8

SCHOLARLY AUTHORITY

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002)	4

REPLY BRIEF

Respondents' principal argument is that review is premature – that the State officials should wait until a class is certified, judgment entered, and Florida's risk-management fund bankrupted, to find out whether this DPPA claim is barred and the officials are entitled to immunity from suit. This Court's preference to review final decisions is irrelevant in this setting, where no material facts are disputed and where issues of Eleventh Amendment and qualified immunity are raised, meaning that the officials' important right to avoid the disruption and burdens of litigation is at stake. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-27 (1985).

The opposition brief fails to grapple with the premises of the petition which are that the legal questions presented are important and that the lower court's errors need to be corrected immediately due to the extensive litigation against state officials in Florida and throughout the Nation. The court below fundamentally misread the DPPA, and authorized a cause of action for billions of dollars in damages against State officials personally, solely for complying with Florida law – a cause of action precluded by the DPPA, the Eleventh Amendment and qualified-immunity principles. As the Imagitas *amicus* brief (pp. 8-9) shows, if this Court does not address the question here, it is unclear when another opportunity will arise. The *in terrorem* effect of the lower court's ruling will mean that State officials will overcomply with the DPPA to avoid disastrous liability. The petition should be granted.

ARGUMENT

I. THE DPPA DOES NOT AUTHORIZE PERSONAL-CAPACITY SUITS FOR DAMAGES AGAINST STATE OFFICIALS IN THESE CIRCUMSTANCES.

A. Respondents' first strawman argument is that no conflict exists concerning whether plaintiffs may file personal-capacity suits for damages against state officials because courts have *sometimes* found that state officials are "persons" under the relevant statutes. Opp. 11-12. From this, respondents erroneously conclude that the DPPA and other statutes authorize *all* personal-capacity suits against state officials.

Under the DPPA, state officials are "persons" for some purposes – *i.e.*, if they disclose driver's license information for personal reasons – but are *not* "persons" when they are sued solely for complying with state laws and policies, and when the only beneficiary of the disclosure of such information is the state. See Pet. 15. In such circumstances, state officials cannot be distinguished from the state. Respondents do not assert that these officials were lining their pockets or otherwise personally motivated; the sole allegation is that the officials complied with Florida law that was preempted by federal law. Such allegations are exclusively subject to enforcement by the Attorney General under DPPA § 2723. Only "[a]dditional unlawful acts," 18 U.S.C. § 2722 – that is, acts other than those pursuant to state laws and policies – give rise to private causes of action against "persons."

Nor is there anything "strange" about the fact that personal-capacity suits against state officials are permitted in some settings, and forbidden in others

(where the nature of the conduct means that the "person" is in fact the state). Opp. 12 & n.5. In attempting to distinguish *Butler* v. *City of Prairie Village, Kansas*, 172 F.3d 736 (10th Cir. 1999), and *Lizzi* v. *Alexander*, 255 F.3d 128 (4th Cir. 2001), respondents ignore that the federal statutes at issue (the ADA and the FMLA) authorize suits against "any person[s]," and yet the courts refused to allow personal-capacity suits against state employees implementing state policy as supervisors. As *Lizzi* explained, "even if Lizzi had actually used the phrase 'individual capacity,' his complaint could not stand." *Id.* at 136-37. Otherwise, "[p]laintiffs like Lizzi would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer." *Id.* at 137. That evasion is precisely what the decision below allows.

B. To gain time for the coercive effect of class certification, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978), and the *in terrorem* effect of massive financial liability to work, respondents next argue that the petition was premature, Opp. 13-15, relying on *Fidelity Federal Bank & Trust* v. *Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in the denial of certiorari). But *Kehoe* states that an "enormous *potential* liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Id.* at 1051 (emphasis supplied). Respondents' class action includes almost all Florida drivers and seeks $2,500 in *liquidated damages* per driver. Even a small award for each class member, accordingly, would result in personal liability of *billions* of dollars.

Moreover, contrary to respondents' contention (Opp. 14), this case differs significantly from *Kehoe*.

BEST AVAILABLE COPY

Petitioners are State officials; Congress crafted the DPPA to prevent States and state officials from facing enormous potential liability based on the enforcement of state laws. Indeed, principles of Eleventh Amendment and qualified immunity should have forestalled further litigation here, militating strongly in favor of immediate review. See *Mitchell*, 472 U.S. at 526 ("immunity from suit . . . is effectively lost if a case is erroneously permitted to go to trial")(emphasis omitted); *Fed. Mar. Comm'n* v. *S. C. Ports Auth.*, 535 U.S. 743, 766 (2002). Even if respondents' reading of the DPPA were to be adopted, it was not clearly established law. See *infra*.

Respondents next observe that the State may not be required to indemnify its officials for the liability incurred here, as if that factor favors delay. Opp. 14-15. If state officials are personally liable in the billions of dollars solely for complying with state law, individuals of sound judgment will hastily vacate these jobs or cease to enforce any state law that poses even a remote risk. In the alternative, state risk management funds will be bankrupted by idemnifying employees who comply with state law; no state could have thought indemnification would generate billions in liability under the DPPA. Congress' scheme protected States from this breathtaking exposure under the DPPA; the lower court's erroneous ruling has put Florida in this bind.

Respondents do not identify any interest served by delaying adjudication. The Court has traditionally found that "where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 259

(8th ed. 2002). The petition presents recurring, clear-cut questions of law that are exceedingly important, particularly to the numerous officials subject to personal-liability suits for performing their state- law duties in alleged violation of the DPPA. What Congress intended should be decided now.[1]

C. Finally, respondents claim that the word "person" in the DPPA includes state officials sued in their personal capacities, even if the sole contention is that the state officials were complying with otherwise lawful state laws and policies. As noted, respondents' lengthy demonstration that suits against state officials are *sometimes* suits against "persons" is immaterial. The critical question is *when* a state official is acting in a "personal capacity." These Florida officials were not.

Incantation of the term individual capacity or personal capacity is insufficient to transform an official-capacity suit into litigation against a person *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986). That is true under the DPPA, as under other federal statutes designed to limit the States' liability in private damages actions.

The State officials agree with respondents on one point. This decision is the first of its kind under the DPPA. Its immediate impact, accordingly, is "only"

---

[1] Respondents claim that even if they lack a DPPA claim against the State officials, they can use § 1983 to enforce the same rights. This is wrong, as explained at Pet. 18 n.4, and in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). The question is "whether Congress meant the judicial remedy expressly authorized by the [DPPA] to coexist with an alternative remedy avialable in a § 1983 action." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120-21 (2005). If Congress foreclosed a private damages remedy against state officials, that remedy is equally unavailable under § 1983.

the litigation of this and other class actions seeking billions in damages from state officials under the DPPA, potentially bankrupting state risk-management funds, altering state law, and driving state officials from public service. These effects demonstrate the urgent need for review.

II. THE ELEVENTH AMENDMENT BARS SUITS AGAINST STATE OFFICIALS BASED SOLELY ON THEIR FULFILLMENT OF STATE-LAW DUTIES.

A. The DPPA should not be interpreted to authorize private parties to bring personal-capacity suits for money damages against state officials based solely on their fulfillment of duties *mandated* by state law. But if the DPPA is so interpreted, it violates the Eleventh Amendment. This Court has instructed that courts must look behind the personal-capacity label and determine whether a suit is actually against the state, *Bender*, 475 U.S. at 543, but has not elaborated on the factors that distinguish personal-capacity suits from official-capacity suits. If any case involves artful pleading to evade the Eleventh Amendment, this case does. In all but name, respondents' claim is against Florida; the State officials could not pay even a penny to each class member, nor could they alter state law.

Other courts of appeals have interpreted the word "person" in analogous statutes and circumstances to *exclude* state officials, avoiding the Eleventh Amendment bar. The court of appeals' failure to do so here warrants this Court's attention.

Respondents' purported distinctions of the cases cited by petitioners fail. In these cases, the courts of appeals heeded this Court's injunction that courts look behind the personal-capacity label and

determine whether a suit is actually against the state. Thus, in *United States ex rel. Gaudineer & Comito, LLP* v. *Iowa*, 269 F.3d 932, 937 n.3 (8th Cir. 2001), the court found (as respondents note, Opp. 20) that it was unnecessary to decide the Eleventh Amendment question. But that was *because the court declined to interpret the word "person" in the FCA to authorize a personal-capacity suit against state officials alleged only to have performed state law duties.* The same was true in *Smith* v. *United States*, 287 F.2d 299, 303-04 (5th Cir. 1961), and *United States ex rel. Dunleavy* v. *County of Delaware*, 279 F.3d 219, 221 (3d Cir. 2002), holding that *government* officials accused only of performing official duties are not "persons" under the FCA. Respondents note that the officials in *Smith* and *Dunleavy* were not *state* officials – a distinction irrelevant to whether they are "person[s]."

Respondents also brush aside the cases holding that plaintiffs cannot circumvent limits on state liability for suits under the FLSA and the FMLA by suing individual state-official supervisors in personal-capacity suits for enforcing state laws and policies. Opp. 21. But these courts recognized that "a suit nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state [– *i.e.*, "to force the state to accede to their view of the Act and to pay them accordingly" –] is barred." *Luder* v. *Endicott*, 253 F.3d 1020, 1023, 1204 (7th Cir. 2001). See also *Montgomery* v. *Maryland*, 266 F.3d 334, 340 (4th Cir. 2001) ("the state is the real party in interest when an official is sued for damages for official acts under the FMLA"). These applications of Eleventh Amendment principles cannot be reconciled with the decision below.

B. As with the DPPA issue, respondents assert that the interlocutory posture of the case should preclude consideration of the Eleventh Amendment claim. For the reasons set forth *supra* at 3-5, that assertion is wrong. As the Imagitas *amicus* brief persuasively shows, States and state officials face ruinous liability *now*. Imagitas Br. at 8-9.

C. Respondents' further claim – that there is some question about whether the State officials' disclosures were required by state law – is wrong. The district court, in ordering discovery about qualified-immunity issues, stated: "Florida law conflicted with the DPPA at the time of the alleged wrongful conduct. *Compare, e.g.*, 18 U.S.C. § 2721, to § 119.07(aa), Fla. Stat. (2000)." App. 53a-54a. The court later held, in granting qualified immunity, that "at the time of [the officials'] conduct, a Florida statutory provision governed the release of records by the [Department.]" *Id.* at 40a-42a (citing Fla. Stat. § 119.07(aa) (2003)). Respondents' statement that "the lower courts have never resolved the question" (Opp. 22-23) is thus wrong. The court of appeals simply *assumed,* as the district court had found, that state law required the officials to disclose the information. App. 10a n.3.

Florida law indubitably required the State officials to disclose drivers' license information. Pet. 8-9. Respondents fail *even to cite* the relevant statutes, which require State officials to disclose that information unless the person to whom it pertained affirmatively requested confidentiality. See Fla. Stat. § 119.07(3)(aa) (effective until Oct. 1, 2003); *id.* § 320.05(3)(a). Contrary to respondents' brief (Opp. 23 n.9), it is irrelevant what form the disclosures took. And, again contrary to respondents' brief (*id.*), Florida's Constitution does not provide a right of privacy in public records. *Michel* v. *Douglas*, 464 So.

2d 545, 546 (Fla. 1985). Instead, under Florida's Constitution Art. I, § 24, the public has a right of access to this data received in connection with the transaction of public business. The State officials made disclosures required by Florida law. The questions presented arise in that context.[2]

Finally, respondents claim that the Eleventh Amendment does not bar personal-capacity suits in this setting because state officials can be personally liable for acts "within the official's authority and necessary to the performance of governmental functions." *Hafer* v. *Melo*, 502 U.S. 21, 28 (1991). Officials *can* be personally liable for such acts, but are not when the individual officials comply with state law, do not act for personal benefit, cannot provide any meaningful remedy, and when judgment for plaintiffs necessitates a change in state law. These factors demonstrate that the suit is against the state. None of this Court's cases cited by respondents remotely suggests that personal-capacity suits can be used to circumvent Eleventh Amendment immunity. In *Hope* v. *Pelzer*, 536 U.S. 730 (2002), this Court denied qualified immunity to prison employees in part because they *violated* state policy embodied in Department of Corrections regulations. *Guinn* v. *United States*, 238 U.S. 347 (1915), involved a *fine*

---

[2] The *Government-in-the-Sunshine Manual* (cited at Opp. 7) is prepared by the Florida Attorney General, the office filing this petition. It is general resource material, not law.

Respondents also argue that petitioners failed to "notify the Attorney General of their constitutional challenge" to the DPPA. Opp. 24. Petitioners raise no such challenge; they maintain that the court of appeals interpreted DPPA in a way that cannot be reconciled with the Eleventh Amendment.

under a *penal* code provision, not any claim of Eleventh Amendment or qualified immunity.[3]

III. THE STATE OFFICIALS WERE ENTITLED TO QUALIFIED IMMUNITY.

The court of appeals made two legal errors in its qualified-immunity analysis. Those errors, not any "fact-bound determination" (Opp. 28), are the subject of this petition.

First, the circuit court gave the back of its hand to the State officials' compliance with their state-law duties, overturning the district court's considered view that the State officials acted reasonably in light of conflicting obligations. See App. 40a (State officials "were faced with a difficult executive-level policy decision; indeed, they were stuck between a proverbial 'rock and a hard place'"). Respondents cite the Supremacy Clause and *Ex Parte Young*, 209 U.S. 123 (1908), in asserting that the State officials *knew* that their state-law obligations were preempted. Opp. 29. But the district court ruled otherwise. The State officials' conduct is not *malum in se*; it was, at worst, *malum prohibitum*, and specific notice of unlawfulness is necessary. Cf. *Staples* v. *United States*, 511 U.S. 600 (1994).

Respondents' citations of this Court's cases are inapt. As noted *supra*, *Hope* denied prison officials qualified immunity in part because they *violated* state regulations. Neither *Lane* v. *Wilson*, 307 U.S. 268 (1939), nor *Nixon* v. *Herndum*, 273 U.S. 536

---

[3] Respondents also argue that a state's decision to indemnify its officials does not by itself immunize those officials from personal liability. Opp. 26-27. That is not petitioners' argument. Our contention is that the billions in damages sought, in conjunction with other factors, demonstrates that the claims are against the State. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974).

(1927), addresses qualified immunity; both find state laws unconstitutional and remand.

Moreover, respondents' argument misses the mark. Positive-law duties are not dispositive, but are "important" to the qualified-immunity analysis. *Wilson* v. *Lane*, 526 U.S. 603, 617 (1999). The district court so held, but the appellate court erroneously treated the State officials' state-law obligations as irrelevant.

Second, respondents say that the State officials' reasonable belief that Florida drivers lacked any private cause of action against them is *irrelevant* to the qualified-immunity analysis. Opp. 28-31. As stated at Pet. 26-27, respondents are wrong to sever the federal right from its federal remedy in analyzing qualified immunity. See *Dennis* v. *Higgins*, 498 U.S. 439, 447 n.7 (1991) (a right is "'[a] legally enforceable claim of one person against another'") (quoting *Black's Law Dictionary*). If respondents lack a legally enforceable claim against petitioners, they have no right. Respondents' cases (Opp. 31) speak in terms of "conduct" because they present no question whether a private cause of action exists.

Nor is there any question of "get[ting] away with the violation." *Id.* at 32. The Attorney General is authorized to challenge state laws under the DPPA. Moreover, petitioners' point is not that reasonable doubt about the cause of action is dispositive. Instead, confronted with conflicting obligations, petitioners reasonably chose to comply with Florida law, in part because it was unclear whether private plaintiffs had any cause of action against them for doing so.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL OF FLORIDA
LOUIS F. HUBENER, III
OFFICE OF THE ATTORNEY GENERAL
SCOTT D. MAKAR
SOLICITOR GENERAL
Florida Capitol
400 S. Monroe Street
Tallahassee, FL 32399-6536
(850) 414-3300

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

November 19, 2007

*Counsel of Record